①

No. 91-697

Supreme Court, U.S.
FILED
OCT 28 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

DIAL INFORMATION SERVICES CORPORATION OF NEW YORK; FABULOUS ASSOCIATES INCORPORATED; SOURCE COMMUNICATIONS INCORPORATED; and TELE-PRO COMMUNICATIONS CORPORATION,

Petitioners,

against

RICHARD L. THORNBURGH, Attorney General of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL R. DICHTER *
ROGER H. BRITON
SEHAM, KLEIN & ZELMAN
485 Madison Avenue
New York, New York 10022
(212) 935-6020
Attorneys for Petitioners

* *Attorney of Record*

Questions Presented for Review

1. Does that portion of the 1989 amendment to the Communications Act of 1934, 47 U.S.C. §§223(b) and (c) ("the Helms Amendment"), which establishes civil and criminal penalties for the knowing transmission of indecent communications for commercial purposes over the telephone, and provides as a safe harbor, the establishment of a "pre-subscription" procedure by which such communications are available only to persons over age 18 who have subscribed in advance and in writing to the service, adequately balance First Amendment considerations supporting constitutionally protected speech by being the "least restrictive means" available for effecting a compelling government interest of protecting minors?

2. Does the Helms Amendment, which criminalizes indecent communications for commercial purposes, and does not define the term "indecent" in the context of the telephone medium, violate the First and Fifth Amendments under the void for vagueness doctrine?

3. Does the Helms Amendment, which directs common carriers to restrict access by telephone to protected speech on the basis of content, grants carriers immunity from liability for a good faith restraint of its subscribers' speech, and affords no opportunity for review prior to the restraint on access, violate the First and Fifth Amendments by constituting a prior restraint on constitutionally protected speech unaccompanied by adequate procedural safeguards?

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

a. The Nature of the Case 5

b. The Proceedings in the Courts Below 7

REASONS FOR GRANTING THE PETITION FOR CERTIORARI 9

I. To Uphold The Helms Amendment, Rather Than Requiring the Government to Prove The Absence Of "Less Restrictive" Alternatives, As Required By This Court In *Sable*, The Second Circuit Shifts The Burden To Plaintiffs To Meet A "Most Effective Means" Standard; This Approach Of The Second Circuit Creates A Conflict Among The Circuits On The Constitutionality Of Comparable Legislative Efforts To Regulate "Dial-A-Porn". 11

II. The Helms Amendment's Treatment Of "Indecent" Communications Is Unconstitutional Under The Void For Vagueness Doctrine; The Second Circuit's Reliance On *Pacifica* Ignores The Distinctions Between The Broadcast And Telephone Mediums And Disregards *Sable* . . . 17

Page

III. The Helms Amendment Abridges the Constitutional Right of Due Process By Failing To Afford The Procedural Safeguards Against Prior Restraints On Free Speech Required By This Court In *Freedman v. Maryland*; Specifically, The Helms Amendment Requires Carriers To Deny Access To Indecent Communications, Affords No Opportunity For Prior Judicial Review, And Holds The Telephone Company Harmless For Its Actions. 22

CONCLUSION 27

Appendices

Page

Opinion of the United States Court of Appeals for the Second Circuit 1a

Order of Preliminary Injunction
United States District Court
Southern District of New York 22a

Opinion and Order
United States District Court
for the Southern District of New York 24a

Order Denying Petition for Rehearing
United States Court of Appeals
for the Second Circuit 65a

Mandate
United States Court of Appeals
for the Second Circuit 67a

Order Recalling Mandate and Granting Stay
Pending Petition for Writ of Certiorari 69a

Rules Adopted by the Federal Communications
Commission Implementing the
Helms Amendment 71a

TABLE OF AUTHORITIES

CASES

Page

Action for Children's Television v. F.C.C., 932 F.2d 1504 (1991) 11

Airport Commissioners of the City of Los Angeles v. Jews for Jesus, 482 U.S. 569, 107 S.Ct. 2568 (1987) 21

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 105 S.Ct. 1504 (1985) 15

Black v. Cutter Laboratories, 351 U.S. 292, 76 S.Ct. 824 (1956) 20

Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423 (1971) 23

Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, (1988) 15

Bogler v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875 (1983) 18

Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157 (1988) 12

Carlin Communications, Inc. v. Federal Communications Commission ("Carlin I"), 749 F.2d 113, 121 (2d Cir. 1984) 13

Page

Carlin Communications, Inc. v. Federal Communications Commission ("Carlin III"), 837 F.2d 546 (2d Cir.), *cert. denied*, 109 S.Ct. 305 (1988) 7, 13, 20

Carlin Communications, Inc. v. Federal Communications Commission ("Carlin II"), 787 F.2d 846, 855 (2d Cir. 1986) 13

City of Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, (1987) 21

Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission, 896 F.2d 780 (3d Cir. 1990) . . . . *Passim*

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026 (1978) . . . . *Passim*

Fort Wayne Books v. Indiana, 489 U.S. 46, 109 S.Ct. 916 (1989) 25

Freedman v. State of Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965) 21, 23

FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596 (1990) 23

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294 (1972) 17, 18, 24

Page

Information Providers' Coalition for Defense of the First Amendment v. F.C.C., 928 F.2d 866 (9th Cir. 1991) . . . 8, 17

Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449 (1974) . . . 22

Keyes v. School District No. 1, Denver, Colorado, 396 U.S. 1215, 90 S.Ct. 12 (1969) . . . 15

Kingsley International Pictures Corporation v. Regents of the University of the State of New York, 360 U.S. 684, 79 S.Ct. 1362 (1959) . . . 10

Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855 (1983) . . . 21

Lamont v. Postmaster General of U.S., 381 U.S. 301, 85 S.Ct. 1493 (1965) . . . 16, 25

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535 (1978) . . . 19

Lugar v. Edmondson Oil, 457 U.S. 922, 102 S.Ct. 2744 (1982) . . . 22

Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946) . . . 10

Mountain States Telephone and Telegraph v. Arizona Corporation Commission, 773 P.2d 455 (Ariz. S. Ct. 1989) . . . 24

Page

NAACP v. State of Alabama ex rel. Patterson,
357 U.S. 449, 78 S.Ct. 1163 (1958) 25

Near v. State of Minnesota, 283 U.S. 697,
51 S.Ct. 625 (1931) 24

New York Times Company v. United States,
403 U.S. 713, 91 S.Ct. 2140 (1971) 24

Papachristou v. City of Jacksonville,
405 U.S. 156, 92 S.Ct. 839 (1972) 18

*Sable Communications of California, Inc. v.
Federal Communications Commission*, 492 U.S.
115, 109 S.Ct. 2829 (1989) . . . . *Passim*

Smith v. Goguen, 415 U.S. 566, 94 S.Ct.
1242 (1974) 17

Talley v. State of California, 362 U.S. 60,
80 S.Ct. 536 (1960) 16, 25

Thomas v. Collins, 323 U.S. 516, 530,
65 S.Ct. 315 (1945) 10

United States v. Eichman, ___ U.S. ___,
110 S.Ct. 2404 (1990) 12

*Village of Hoffman Estates v. Flipside,
Hoffman Estates, Inc.*, 455 U.S. 489,
102 S.Ct. 1186 (1982) 17

Virginia v. American Booksellers Association,
Inc., ___ U.S. ___, 108 S.Ct. 636 24

CONSTITIONAL PROVISIONS AND STATUTES

Page

U.S. Const. amend 1

U.S. Const. amend 5

47 U.S.C. §223(b) 7

47 U.S.C. §223(c) 7

Pub. L. No. 101-166, tit. V, §521(1),
103 Stat. 1159 (1989) 7

OTHER AUTHORITIES

Cong. Rec. S15794, daily ed. Nov. 16, 1989 10

Cong. Rec. S15796, daily ed. Nov. 16, 1989 10

Cong. Rec. S15797, daily ed. Nov. 16, 1989 9

Cong. Rec. S15800, daily ed. Nov. 16, 1989 10

Regulations Concerning Indecent Communications by
Telephone, In re, Gen. Docket No. 90-64,
Report and Order, released June 29, 1990 . . . 8, 19

No. 91-________

IN THE

Supreme Court of the United States

October Term, 1991

DIAL INFORMATION SERVICES CORPORATION of NEW YORK,
FABULOUS ASSOCIATES INCORPORATED,
SOURCE COMMUNICATIONS INCORPORATED and
TELE-PRO COMMUNICATIONS CORPORATION,

Petitioners,

- against -

RICHARD L. THORNBURGH, ATTORNEY GENERAL
of the UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Dial Information Services Corporation of New York, Fabulous Associates Incorporated, Source Communications Incorporated and Tele-Pro Communications Corporation, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals, is reported at 938 F.2d 1535 (2d Cir. 1991), and is set forth in the Appendix commencing at 1a.[1] The opinion of the District Court is reported at 742 F. Supp. 1255 (S.D.N.Y. 1990) and is set forth in the Appendix beginning at 24a.

Jurisdiction

The original judgment of the Second Circuit was entered on July 15, 1991. Petitioners filed a timely petition for rehearing with suggestion of the appropriateness of rehearing *en banc* on July 29, 1991. The motion was denied by order dated September 3, 1991 (65a) and mandate issued on September 11, 1991 (67a). Petitioners filed, on September 19, 1991, a motion for recall of the mandate and for a thirty day stay of the issuance of a new mandate to enable Petitioners to prepare and file this Petition. By order dated September 27, 1991, the Second Circuit recalled the mandate and granted a stay of the issuance of a new mandate for a period of thirty days (69a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

---

[1] References as to the Appendix to this Petition are referred to herein as (___a).

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The 1989 amendment to the Federal Communications Act of 1934, 47 U.S.C. §§223(b) and (c) (the "Helms Amendment") (emphasis added), provides:

(b) PROHIBITED COMMERCIAL PURPOSES; DEFENSE TO PROSECUTION

(1) [bans obscene communications] ....

(2) Whoever knowingly--

(A) within the United States, by means of telephone, makes (directly or by recording device) any *indecent communication for commercial purposes* which is available to any person under 18 years of age or any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the [Federal Communications] Commission may prescribe by regulation.

(4) In addition to the penalties under paragraph (1), whoever, within the United States, intentionally violates paragraph (1) or (2) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5) (A) In addition to the penalties under paragraphs (1), (2), and (4), whoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either--

(i) by a court, pursuant to civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(6) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1) or (2). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

(c) RESTRICTION ON ACCESS TO SUBSCRIBERS BY COMMON CARRIERS; JUDICIAL REMEDIES RESPECTING RESTRICTIONS

(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) of this section from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

(2) Except as provided in paragraph (3), no cause of action may be brought in any administrative agency against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of--

(A) any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection; or

(B) any access permitted--

(i) in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b) of this section, or

(ii) because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b) of this section.

(3) Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action shall be limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only to subscribers who have previously requested such access.

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law. . . abridging freedom of speech."

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

a. The Nature of the Case

This action challenges the constitutionality of the Helms Amendment which regulates the communication of constitutionally protected speech, by establishing civil and criminal penalties for the knowing transmission of indecent communication over the telephone, and providing as a safe harbor, the establishment of a "pre-subscription" procedure by which such communications are available only to persons over age 18 who have subscribed in advance and in writing to the service. 47 U.S.C. §§223(b)(2), (c).[2] Plaintiffs are "information providers" (or "IPs") which operate various telephone services which include adult programming. The District Court held that "plaintiffs represent the constitutional interests of their listeners, as well as their own interests as speakers." (29a, 742 F. Supp. 1259).

The Helms Amendment is Congress' third attempt to regulate allegedly indecent telephone communications. The first was struck down as unconstitutional in part by the Second Circuit in *Carlin Communications, Inc. v. Federal Communications Commission*, 837 F.2d 546 (2d Cir.), *cert. denied*, 109 S.Ct. 305 (1988) ("Carlin III"); the second was, likewise, held unconstitutional in part, this time by this Court in *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 109 S.Ct. 2829 (1989). Within months of the decision in *Sable*, within days of the introduction of the bill, and just days prior to the end of the 1989 term, Congress, without the benefit of hearings or committee reports, took its third pass at this subject and unanimously enacted the Helms Amendment as an amendment to the Labor/Health appropriations bill. Pub. L. No. 101-166, tit. V, §521(1), 103 Stat. 1159, 1192-93 (1989). Congress followed this course, despite this Court's admonition —— only months earlier —— regarding Congress' non-deliberative approach to the perceived "dial-a-porn" problem. *Sable*, 492 U.S. at 129, 109 S.Ct. at 2838. Pursuant to its terms, the Helms Amendment was to become effective March 21, 1990.

---

[2] Petitioners did not challenge below the Helms Amendment's ban on obscene communications or the compelling interest in protecting minors. Rather, Petitioners seek review of the Helms Amendment's restrictions on access by adults to indecent speech. A violation of the Helms Amendment subjects the offender to civil and criminal fines of $50,000 for each violation per day, 47 U.S.C. §§223(b)(4), (5), and imprisonment for a period of up to six months. 47 U.S.C. §223(b)(2)(B). A telephone company billing for alleged indecent communications on behalf of the provider is required to deny access, to the extent technically feasible, and the carrier is granted immunity for any action taken in good faith. 47 U.S.C. §223(c)(1)(2). An individual denied access by a carrier may bring a declaratory judgment action 47 U.S.C. §223(c)(3).

b. The Proceedings in the Courts Below

Prior to the effective date of the Helms Amendment -- March 21, 1990 -- Petitioners initiated this action and moved for a temporary restraining order and preliminary injunction. Based on the Government's representation that the Helms Amendment would not be enforced prior to the promulgation of regulations by the Federal Communications Commission ("F.C.C."), Petitioners withdrew their request for a temporary restraining order and the District Court held six days of hearings on Petitioners' application for a preliminary injunction. Following promulgation of F.C.C. regulations which would become effective on August 15, 1990,[3] the District Court, on August 13, 1990, granted Petitioners' motion and concluded, following a thorough and detailed analysis of both the applicable constitutional principles and the substantial record evidence, that the Helms Amendment was unconstitutional on *three* independent bases:

---

[3] A copy of the F.C.C. regulations are attached at 71a-72a. In essence, those regulations create ***additional*** conditions for qualification for a safe harbor including: (1) written notice by the IP to the common carrier that it is providing "indecent" programming; and (2) a requirement that the programming be limited to (a) persons paying by credit card, or (b) persons submitting a written application to the carrier ***and*** either (i) using an access code obtained upon submitting an additional written application to the service provider, or (ii) use of a descrambler. 47 C.F.R. 64.201(a), reprinted in, ***In re Regulations Concerning Indecent Communications by Telephone***, Gen. Docket No. 90-64, Report and Order, released June 29, 1990. In ***Information Providers' Coalition for Defense of the First Amendment v. F.C.C.***, 928 F.2d 866 (9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit upheld the F.C.C. regulations. No petition for certiorari was filed with this Court.

> [t]here is a likelihood that plaintiffs will succeed on the merits of their claims that the Helms Amendment (1) violates the First Amendment by failing to employ the least restrictive means to effect a compelling government interest, (2) violates the First and Fifth Amendments under the void for vagueness doctrine, and (3) violates the First and Fifth Amendments by containing a prior restraint unaccompanied by adequate procedural safeguards. Thus the enforcement of the Helms Amendment presents a threat of imminent irreparable harm to First Amendment freedoms. Plaintiffs' motion for a preliminary injunction is granted.

(64a, 742 F. Supp. 1275). On August 29, 1990, the District Court entered a "nationwide" preliminary injunction restraining enforcement of the Helms Amendment (22a).

While the preliminary injunction restraining enforcement of the Helms Amendment remained in place, the Government appealed. Ultimately, eleven months after the District Court decision ruling the statute unconstitutional, the Second Circuit reversed on all three grounds.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

In granting a constitutional seal of approval to Congress' most recent non-deliberative attempt to regulate "dial-a-porn",[4] the Court below has broadly and unnecessarily curtailed —— if not destroyed —— adult access to lawful, protected speech. While the indecent speech here at issue may to some be considered offensive, it must never be forgotten that the First Amendment holds a preferred position in our constitutional scheme because it secures "great. . .indispensable democratic freedoms. . .", *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 322 (1945), *see Marsh v. Alabama*, 326 U.S. 501, 509, 66 S.Ct. 276, 280 (1946), and provides protections which are "not confined to the expression of ideas that are conventional or shared by a majority." *Kingsley International Pictures Corporation v. Regents of the University of the State of New York*, 360 U.S. 684, 689, 79 S.Ct. 1362, 1365 (1959).

---

[4] As noted, there were no hearings or committee reviews on the proposed legislation (*see* Cong. Rec. S15797, daily ed. Nov. 16, 1989, remarks of Senator Spector). Other than Senator Helms' efforts to support the statute (continued...)

In contrast, the Opinion of the Court of Appeals plainly reveals the Court's disdain for Petitioners and suggests the relative unimportance of the issues here presented:

> "[Petitioners] are in fact purveyors of pornography and, as is to be expected, their challenge to the statute in this case is grounded in the first amendment" (3a, 938 F.2d at 1537).

---

[4](...continued)
with references to, among other things, the degeneracy of the Roman Empire (*see* Cong. Rec. S15794, daily ed. Nov. 16, 1989) the only other Senator to speak to the legislation was Senator Spector. His remarks served as repeated warnings to the Senate that its hasty judgment opened the door for successful constitutional challenge. *See* Cong. Rec. S15796 ("the last time the issue of dial-a-porn was presented to the Congress, it was an amendment very much in this posture, without being carefully and deliberately crafted to ensure it would pass constitutional muster"); Cong. Rec. S15800 (remarking that "I repeat that we have only had a few minutes to consider [the proposed amendment] today" and agreeing to "conduct a colloquy for purposes of legislative history. . . to do our very best to satisfy the Supreme Court so that we have an effective bill").

As set forth below, to find the statute constitutional, the Court (1) ignored settled Supreme Court constitutional analysis, issued a decision in conflict with a prior holding of the Third Circuit, and otherwise misapplied the "least restrictive means" requirement, thereby failing to balance the right to utter and/or receive constitutionally protected speech against the Government's need to further a compelling interests, (2) ignored the teachings of *Sable* by applying the indecency analysis of *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026 (1978) to the review of a statute providing criminal penalties for indecent communications in the telephone medium, and in so doing, undermined the void for vagueness doctrine, (3) avoided a state action finding by misapplying New York law in disregard of the record, and ignored the obvious "freezing" effect on free speech caused by a pre-subscription requirement, to conclude that the statute does not constitute a prior restraint, and (4) substituted its "common sense" for the findings of fact of the District Court based on extensive record evidence in disregard of the standards of review established by this Court.

The mere contrast of the analyses and conclusions of the District Court and the Court of Appeals vividly illustrates the serious constitutional issues presented in this case.[5]

---

[5] The federal courts have struggled with congressional and regulatory attempts to limit indecent communications and would, no doubt, welcome further direction by this Court. For example, the D.C. Circuit recently struck down, for the second time, F.C.C. limitations on broadcast indecency. *Action for Children's Television v. F.C.C.*, 932 F.2d 1504 (1991). Thus, the Second Circuit's decision results in the anomaly that the telephone medium may be subjected to greater restrictions on indecent communications than the broadcast medium.

I. To Uphold The Helms Amendment, Rather Than Requiring the Government to Prove The Absence Of "Less Restrictive" Alternatives, As Required By This Court In *Sable*, The Second Circuit Shifts The Burden To Plaintiffs To Meet A "Most Effective Means" Standard; This Approach Of The Second Circuit Creates A Conflict Among The Circuits On The Constitutionality Of Comparable Legislative Efforts To Regulate "Dial-A-Porn".

By transferring the burden to a plaintiff to demonstrate that less restrictive alternatives are the most effective method of achieving the compelling interest, the Second Circuit's decision radically alters the "least restrictive means" standard for review of governmental action restricting free speech. The Court's interpretation of *Sable* is directly in conflict with a prior holding of the Third Circuit placing the burden on the Government to show the absence of less restrictive means of furthering the government's compelling interest.

Since the Helms Amendment is content-based regulation of speech; *see United States v. Eichman*, ___ U.S. ___, 110 S.Ct. 2404 (1990); *see also Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157 (1988), and since "[s]exual expression which is indecent but not obscene is protected by the First Amendment," *Sable*, 492 U.S. at 126, 109 S.Ct. at 2836, the Government may only adopt a statutory scheme for regulating such speech which constitutes "the least restrictive means to further the articulated [compelling] interest," *Id.* To ensure that it has done so, the means adopted to regulate the speech must be closely scrutinized to determine whether an alternative exists which, while furthering the Government's ends, minimizes the interference with First Amendment freedoms. *Sable*, 492 U.S. at 126, 109 S.ct. at 2836. Thus, the existence of compelling ends alone is not sufficient, *id.*; nor is it sufficient that alternate means may be somewhat less effective than the means chosen by Congress to address the problem. 492 U.S. at 126, 109 S.Ct. at 2837-39. Moreover, it is the Government which has the heavy burden of proving that its interests could not be served by less restrictive means. *Id.* at 2836; *see Carlin III*, 837 F.2d at 555 quoting *Carlin Communications, Inc. v. Federal Communications Commission ("Carlin I")*, 749 F.2d 113, 121 (2d Cir. 1984) ("The government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression."); *Carlin Communications, Inc. v. Federal Communications Commission, ("Carlin II")* 787 F.2d 846, 855 (2d Cir. 1986); *see also Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780, 783-85 (3d Cir. 1990) (quoting *Carlin I*).

As the District Court carefully documented from the record, there exists a technologically available means -- voluntary blocking -- which would further the Government's ends of protecting minors while being far less restrictive of the First Amendment rights of adults (41a-43a, 742 F. Supp. 1264-65).[6] Yet, the Second Circuit disregards these findings of fact and these settled principals of law by imposing *upon plaintiffs* the burden of establishing "that there are other approaches less restrictive than the Helms Amendment but *just as effective* in achieving its goal of denying access by minors to indecent dial-a-porn messages" (15a, 938 F.2d at 1541) (emphasis added). *Sable*, however, makes clear that the standard is not whether alternative less restrictive means are just as effective as those chosen by Congress, but whether they are or can be effective in *furthering* the articulated interest.[7] 109 S.Ct. at 2836. Remarkably, the Second Circuit failed to even address the First Amendment considerations underlying the "least restrictive means" standard and jettisoned those fundamental protections by substituting a "most effective means" test.[8]

---

[6] Under voluntary blocking, "any household can have its access to sexually explicit telephone services, as well as other commercial telephone services, blocked free of charge by contacting the telephone company and requesting central blocking." (35a, 742 F. Supp. at 1261-62). The District Court concluded that the Government failed to meet its burden by failing to contradict --either during the Congressional process, F.C.C. deliberations, or the hearings before the Court -- the "proposition that a properly implemented version of New York's current voluntary blocking system is adequately protective of children and is less restrictive than either pre-subscription requirements or an independent billing mechanism." (41a, 742 F. Supp. at 1264).

Not only did the Court below apply the wrong standard and improperly shift the burden of proof from the Government (which should bear the *heavy burden* of justifying its choice of means) to the Petitioners (who must now bear the burden of establishing the existence of less restrictive equally effective means), its conclusion regarding the effectiveness of voluntary blocking —— an obviously less restrictive alternative to pre-subscription (14a-16a) —— were based upon personal "common sense" views[9] substituted for record evidence carefully marshalled and analyzed by the District Court (43a-44a, 742 F. Supp. at 1265-66). Accordingly, while the District Court found that the evidence presented at the preliminary injunction hearing concerning the effectiveness of New York's voluntary blocking system "did not show that minors were obtaining exposure to adult services without their parents' consent" (44a, *id.* at 1266) —— a finding based on the expert conclusion repeatedly reached by the New York Public Service Commission and supported by the total absence of any evidence of complaints regarding exposure of minors where voluntary blocking was available (*id.*) —— the Court below simply concluded that the District Court's finding on the effectiveness of voluntary blocking was "clearly erroneous" (17a, 938 F.2d 1542). In reaching this conclusion, the Court below improperly substituted its judgment for that of the finder of fact without the benefit of any fair or comprehensive review of the *entire evidence. See Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 105 S.Ct. 1504, 1511 (1985).[10]

---

[7] *Sable* addressed a prior version of the Helms Amendment which legislated a total ban on indecent communications. While the Government insisted that the total ban was the most effective approach for limiting children's access, it was nevertheless struck down in favor of less restrictive and potentially even less effective alternatives.

[8] Nor does the magnitude of the state interest purportedly implicated here -- protection of minors -- warrant this unprecedented formulation. Indeed, it was the very same "compelling" interest which the *Sable* Court was addressing when it struck down the prior Congressional effort on a "least restrictive means" basis. *Sable*, 492 U.S. at 126, 109 S.Ct. at 2836.

[9] Among the Panel's statements were the following: "It seems to us that voluntary blocking would not even come close to eliminating as much of the access of children . . . as would . . . presubscription. . . ." (15a, 938 F.2d 1542); "[c]ommon sense dictates that a presubscription requirement . . . is more likely to achieve the goal sought than blocking after one or

(continued...)

The decision below effectively equates "carefully tailored" regulations with a "least restrictive means" analysis. They are not the same. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3033 (1988). To meet the burden of proving a narrowly tailored regulation, the Government must show "a fit between the legislature's ends and the means chosen to accomplish those ends -- a fit . . . that employs not necessarily the least restrictive means but . . . a

---

[9] (...continued)

more occasions of access" (16a, 938 F.2d 1542); voluntary blocking "clearly is not an effective means. . . . Voluntary blocking simply does not do the job of shielding minors from dial-a-porn" (17a, 938 F.2d 1542).

[10] "Where a preliminary injunction has issued to vindicate constitutional rights, the presumption in favor of the District Court's action applies with particular force." *Keyes v. School District No. 1, Denver, Colorado*, 396 U.S. 1215, 1216, 90 S.Ct. 12, 12 (1969).

means narrowly tailored to achieve the desired objective." *Id.* at 3035.

If it were not enough that the Second Circuit disregarded the teachings of this Court, its decision also creates a conflict among the circuits on the constitutionality of comparable legislative efforts to control "dial-a-porn". Thus, in *Fabulous*, the Third Circuit held that Pennsylvania's regulatory approach —— which required callers to obtain, in advance, access codes (now a requirement additional to pre-subscription under the F.C.C. regulations pursuant to the Helms Amendment, 70a-71a) —— was, *standing alone*, unconstitutional for failing to meet the "least restrictive means" test required to properly balance First Amendment considerations against compelling Governmental interests in restricting constitutionally protected speech. *Fabulous*, 896 F.2d at 785-88.[11] Thus, although the only other Court of Appeals to address the constitutionality of the

---

[11] The Third Circuit found that:

> The Commonwealth argues that plaintiffs have not shown that [the presubscription requirement] imposes any restraint or impact on protected speech. It emphasizes that here, unlike in Sable, there is no outright prohibition on indecent communication. However, the First Amendment protects against government "inhibition as well as prohibition" *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 309, 85 S.Ct. 1493, 1497 (1965) (Brennan, J., concurring). An identification requirement exerts an inhibitory effect, *Talley v. State of California*, 362 U.S. 60, 64-65, 80 S.Ct. 536, 538-39 (1960), and such deterrence raises First Amendment issues comparable to those raised by direct state imposed burdens or restrictions. . . . .
>
> We thus conclude that there is sufficient evidence to support the district court's finding that the statutory requirement of access codes to hear sexually suggestive telephone messages imposes a burden on the exercise of the callers' First Amendment rights and chills the message services' protected speech.

Fabulous, 896 F.2d at 785, 787.

Helms Amendment has, like the Second Circuit, held it to be constitutional (*see Information Providers' Coalition for Defense of the First Amendment v. Federal Communications Commission*, 928 F.2d 866 (9th Cir. 1991)), those decisions are plainly incompatible with the Third Circuit decision —— which the Second and Ninth Circuits do not address —— in *Fabulous*.

The decision of the Second Circuit panel in this case, upholding the constitutionality of the Helms Amendment despite the fact that it is not the least restrictive means presently available to further the Government's interest in protecting minors, sharply alters the established balance required by the First Amendment. This petition should be granted in order to address and clarify this issue of constitutional analysis and resolve the conflict in the Circuits over the proper scope of legislative efforts to control "dial-a-porn."

II. The Helms Amendment's Treatment Of "Indecent" Communications Is Unconstitutional Under The Void For Vagueness Doctrine; The Second Circuit's Reliance On *Pacifica* Ignores The Distinctions Between The Broadcast And Telephone Mediums And Disregards *Sable*

The Helms Amendment imposes *criminal* and civil penalties for knowingly making by telephone "any indecent communication for commercial purposes" which is available to minors. 47 U.S.C.§223(b)(2)(A). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972). Because it imposes both civil and criminal penalties and reaches constitutionally protected speech, the Helms Amendment requires the most strict scrutiny. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193-94 (1982); *Smith v.*

Goguen, 415 U.S. 566, 573, 94 S.Ct. 1242, 1246 (1974). Accordingly, to pass constitutional muster, the terminology of the statute must (1) provide fair warning as to what conduct is prohibited, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843 (1972), (2) not be subject to arbitrary or discriminatory enforcement, *Grayned*, 408 U.S. at 108-09, 92 S.Ct. at 2298-99, and (3) must not deter protected speech not subject to the regulation. *Id.* at 109, 92 S.Ct. at 2299.

Applying these standards to the term "indecent", the District Court concluded that the term is highly ambiguous (55a-56a, 742 F. Supp. 1271), particularly where, as here, it cannot be defined with reference to the term "obscene" (*id.*). After carefully considering and rejecting the Government's attempt to transplant the definition of "indecent" in the broadcast medium, relying on *Pacifica*, 438 U.S. 726, the District Court concluded, on the authority of *Sable*, 492 U.S. 127-28, 109 S.Ct. at 2837, *Pacifica* to be "readily distinguishable" because the radio medium is "manifestly different" from the telephone medium. (54a, 742 F. Supp. at 1270). *See also Bogler v. Youngs Drug Products Corp.*, 463 U.S. 60, 74, 103 S.Ct. 2875, 2884 (1983) ("the special interest of the Federal Government in regulation of the broadcast media, does not readily translate into a justification for regulation of other means of communication").

In reversing the District Court, the Second Circuit panel found —— relying upon the FCC definition, which merely substituted "telephone" for "broadcast" in the definition of "indecency" reviewed in *Pacifica* —— that "the term 'indecent' as used in the Helms Amendment is sufficiently defined to provide guidance to 'the person of ordinary intelligence' in the conduct of his affairs" (14a, 938 F.2d 1541).

However, the Court's almost mechanical reliance on the F.C.C.'s definition and *Pacifica* is entirely misplaced. To begin with, reliance on the F.C.C. definition under the guise that the agency is charged with administration of the statute is to ignore the principle that deference *even to Congress* is improper "when First Amendment rights are at stake." *Sable*, 492 at 129, 109 S.Ct. at 2838, citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S.Ct. 1535, 1543 (1978).[12] Further, in *Sable*, the Court rejected the lessor standard of review applied in *Pacifica* in favor of the more exacting strict scrutiny analysis applicable to material protected by the First Amendment 109 S.Ct. at 2837; *see also Fabulous*, 896 F.2d at 784-785.

Moreover, even if the FCC definition were entitled to some deference, the exclusive reliance on *Pacifica* by both the FCC and the Second Circuit, as the basis for transposing the broadcast definition of indecency to the telephone medium, is precluded by settled law.[13] *Sable*, 492 U.S. at 127, 109

---

[12] "To the extent that the Government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution." *Sable*, 492 U.S. at 129, 109 S.Ct. at 2838.

[13] The F.C.C. Opinion adopting its regulations states:

> In the broadcasting context, the courts have upheld the Commission's definition of indecency as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the *broadcast* medium." *Pacifica* [citation omitted]. . . . Thus, in the dial-a-porn context, we believe it is appropriate to define indecency as a description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the *telephone* medium.

In re Regulations Concerning Indecent Communications by Telephone, Gen. Docket No. 90-64, Report and Order, released June 29, 1990 (emphasis (continued...)

S.Ct. at 2837 (calling *Pacifica* "an emphatically narrow holding. . ."); *Carlin III*, 837 F.2d at 559-60; *Fabulous*, 896 F.2d at 783-84. Needless to say, where *Pacifica* involved a radio broadcast "intruder" into the home, *Pacifica*, 438 U.S. at 748-49, 98 S.Ct. 3039-40, there is no such "intruder" problem here. *See Sable*, 492 U.S. at 127, 109 S.Ct. at 2837.

Moreover, unlike the mild regulatory sanction against licensees at issue in *Pacifica*, the Helms Amendment is a statute of general application imposing civil and *criminal* (including penal) sanctions. *Pacifica* expressly did not address these issues in the context of potential criminal prosecution, stating "[i]t is appropriate, in conclusion, to emphasize the narrowness of our holding. . . . We have not decided that. . .this broadcast would justify a criminal prosecution." 438 U.S. at 750, 98 S.Ct. at 3041; *see Carlin III*, 837 F.2d at 560.

The F.C.C.'s definition of indecency does nothing to cure the vagueness inherent in the novel application of that concept to the relatively new telephone medium. Indeed, the "indecent" prohibition is especially vague in the context of live information programs, offered by some of the petitioners and other IPs, such as live "group access bridging" or party line programs, live one-on-one conversation programs, and live ("real-time") videotext "bulletin board" conversations, all of which involve communications *by callers* and may not involve any speech by IPs themselves. Especially in these contexts, the line between "indecent" conversation and "decent"

---

[13](...continued)
added). (*See* 12a-13a, 938 F.2d at 1540). Remarkably, this "definition" does not even appear in the regulations which the F.C.C. adopted but in the body of its opinion. A "[c]ourt, however, reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297, 76 S.Ct. 824, 827 (1956).

conversation is far too elusive for use in a criminal statute. *Cf. City of Houston v. Hill*, 482 U.S. 451, 462, 107 S.Ct. 2502, 2510 n. 11 (1987); *Airport Commissioners of the City of Los Angeles v. Jews for Jesus*, 482 U.S. 569, 575-76, 107 S.Ct. 2568, 2572-2573 (1987) (holding substantially overbroad limitations on free speech that, similar to the Helms Amendment, could only be clarified through "a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable"). *Kolender v. Lawson*, 461 U.S. 352, 359, 103 S.Ct. 1855, 1859 n. 8 (1983).

The issue of vagueness in the context of the telephone medium has never been addressed by this Court. The Second Circuit panel chose to rely on authority which this Court has held to be readily distinguishable. This petition should be granted in order to clarify and establish the legislative and regulatory standards that will meet constitutional muster in this most elusive of areas.

III. The Helms Amendment Abridges the Constitutional Right of Due Process By Failing To Afford The Procedural Safeguards Against Prior Restraints On Free Speech Required By This Court In *Freedman v. Maryland*; Specifically, The Helms Amendment Requires Carriers To Deny Access To Indecent Communications, Affords No Opportunity For Prior Judicial Review, And Holds The Telephone Company Harmless For Its Actions.

The Helms Amendment provides that a common carrier "shall not, to the extent technically feasible, provide access to a [indecent] communication. . .from the telephone of any subscriber who has not previously requested in writing the carrier to provide access. . . ." 47 U.S. 223(c)(1). The District Court found that this provision, unaccompanied by procedural safeguards, constitutes an unconstitutional prior restraint on protected speech. (63a; 742 F. Supp. at 1271) The Court of Appeals reversed, holding that, despite the plain language of the Helms Amendment, common carriers are (1) not state actors, (2) not required to classify which messages are indecent and, (3) that, in any event, a pre-subscription requirement is not a restraint on free speech. (18a-20a, 938 F.2d 1543). These holdings of the Court of Appeals conflict with governing state utility law, the precedents of this Court, and the holding of the Third Circuit in *Fabulous*.

In holding that carriers are not state actors, the Court below found that carriers are not required to bill for information providers and, therefore, despite the fact that a federal law compels a prior restraint, state action is not implicated. Even if, *arguendo*, the Court's premise is correct, the Court overlooked the rules of the New York Public Service Commission which prohibit a common carrier from "imposing a system of pre-subscription or independent billing, unless the government acts by passing a law requiring such restrictions." (60a, 742 F. Supp at 1273). New York Law similarly prohibits content-based discrimination by carriers in the transport or billing of IP services. (59a-60a, 742 F. Supp. at 1273) Thus, at least in New York, any action by a carrier to implement pre-subscription or deny billing and collection based on the content of the program would *only* be attributable to the Helms Amendment.

Since the common carrier would not be free to make the independent business decision to cease billing and collection for indecent communications, the Helms Amendment establishes the "close nexus between the State and the challenged action of the regulated entity so that the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453 (1974); *see Lugar v. Edmondson Oil*, 457 U.S. 922, 937-942, 102 S.Ct. 2744, 2753-2756 (1982). In contrast, under the Court of Appeals reasoning, the Government may circumvent the most basic constitutional safeguards merely by authorizing private corporations to do its bidding.

As the statute mandates that carriers "shall not. . .provide access to indecent communications", 47 U.S.C. §223 (c)(1), the Helms Amendment requires carriers "to classify which services are indecent" and then to act on its classification by imposing pre-subscription.[14] In so doing, as recognized by the District Court,

> "The statute fails to provide any of, what has come to be known as, the three Freedman safeguards. . . .The first safeguard is not present because the statute does not limit the time period prior to judicial review during which the carrier's determination, that communications will be indecent, will be in effect. . .The second and third safeguards are not satisfied here, because the only provision for judicial review of the carrier's determination is Section 223(c)(3). That section provides neither for expedited judicial review, for the carrier to bear the

---

[14] Under the clear principles established by this Court, denial of access to protected speech cannot be done without procedural due process. ***Freedman v. State of Maryland***, 380 U.S. 51, 85 S.Ct. 734 (1965); ***Blount v. Rizzi***, 400 U.S. 410, 416, 91 S.Ct. 423, 428 (1971). Under the three part ***Freedman*** test:

(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. ***FW/PBS, Inc. v. City of Dallas***, 110 S.Ct. 596, 606 (1990) quoting ***Freedman***, 380 U.S. at 58-60, 85 S.Ct. 738-40.

> burden of going to court, nor for the carrier to bear the burden of proof at trial."

(62a, 742 F. Supp. 1274). The fact that the Helms Amendment puts the burden on the service provider to go to court, on a per program basis, for a ruling that a program is not indecent reverses this Court's mandate that the burden of going to court and justifying censorship be on the Government.

However, the Court of Appeals also found that, even if carriers are state actors, then neither self-identification by an information provider -- to obtain the safe harbor of limiting access to its program to those pre-subscribing -- nor pre-subscription by a caller -- to obtain access to carrier restricted IP adult programming -- is a prior restraint. These conclusions by the Court conflict directly with the finding of the Third Circuit in *Fabulous*. *See also Mountain States Telephone and Telegraph v. Arizona Corporation Commission*, 773 P.2d 455 (Ariz. S.Ct. 1989). As for the information provider, a requirement of self-identification would clearly chill speech by requiring "self-censorship; a harm that can be realized even without an actual prosecution." *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 108 S.Ct. 636, 642; *see Grayned v. City of Rockford*, 408 U.S. at 108-09, 92 S.Ct. 2298-99 ("steer far wider of the unlawful zone.") (citation omitted). The pre-subscription requirement places a significant chill on the exercise of free speech by requiring that individual listeners or speakers provide a permanent record, providing personal identifying information -- thereby surrendering their anonymity -- as a condition of obtaining access to protected speech. *See New York Times Company v. United States*, 403 U.S. 713, 91 S.Ct. 2140 (1971); *Near v. State of Minnesota*, 283 U.S. 697, 51 S.Ct. 625 (1931); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916 (1989).[15]

Nevertheless, the Second Circuit found that "there is no restraint of any kind on adults who seek access to dial-a-porn. A requirement that one desiring access make an advance request therefore simply does not constitute a prior restraint." (21a). In contrast, the Third Circuit, in ***Fabulous***, recognizing the "societal opprobrium", 896 F.2d 785, quoting the District Court Opinion 693 F. Supp. 332, 338 (E.D. Pa 1988), associated with dial-a-porn messages and the undesirability of having one's name and address at the disposal of message providers and other third parties, found that a requirement of applying for access codes "to hear sexual suggestive telephone messages imposes a burden on the exercise of the callers' First Amendment rights and chills the message services' protected speech." *Fabulous*, 896 F.2d at 787.

As the Court of Appeals sanctions the use of common carriers to engage in prior restraints on speech, without adequate procedural safeguards, and holds a written pre-subscription not to be a prior restraint, the Court should grant certiorari to review the manner in which the Government may delegate the power to censor speech in advance of expression to third parties and the extent to which a self-identification process constitutes a prior restraint on access to protected speech.

---

[15] By compelling self-identification and deterring willing listeners' the ability to obtain information, and to confer anonymously with one another by telephone, the pre-subscription requirement also directly infringes the First Amendment's rights of assembly and association. Talley, 362 U.S. 60, 64, 80 S.Ct. 536, 538 (1960); *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 463-65, 78 S.Ct. 1163, 1172-73 (1958); *see Lamont v. Postmaster General of the United States*, 381 U.S. 301, 85 S.Ct. 1493 (1965).

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be granted.

Dated: October 25, 1991
New York, New York

Respectfully submitted,

JOEL R. DICHTER*
ROGER R. BRITON

SEHAM, KLEIN & ZELMAN
485 Madison Avenue
New York, New York 10022
(212) 935-6020
Attorney for Petitioners

* *Attorney of Record*

APPENDICES

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

◆

No. 1102—August Term 1990

(Argued February 21, 1991 Decided July 15, 1991)

Docket No. 90-6289

◆

DIAL INFORMATION SERVICES CORPORATION OF NEW YORK; FABULOUS ASSOCIATES INCORPORATED; SOURCE COMMUNICATIONS INCORPORATED; TELE-PRO COMMUNICATIONS CORPORATION,

Plaintiffs-Appellees,

—against—

RICHARD L. THORNBURGH, Attorney General of the United States,

Defendant-Appellant.

◆

Before:

FEINBERG, MINER and MAHONEY,
Circuit Judges.

◆

Appeal from preliminary injunction order entered in United States District Court for the Southern District of New York (Patterson, Jr., *J.*) enjoining enforcement of statute that prohibits providers of indecent telephone communications for commercial purposes from making services available to persons under 18 but allows "safe harbor" defense for providers that comply with telephone company presubscription procedures or engage in independent billing and collection; District Court determined that term "indecent" is void for vagueness and that presubscription is not least restrictive means of furthering compelling government interest in protecting minors and imposes unconstitutional prior restraint of speech.

Reversed.

◆

EDWARD T. FERGUSON, III, Assistant United States Attorney for the Southern District of New York (Otto G. Obermaier, United States Attorney for the Southern District of New York, Gabriel W. Gorenstein, Assistant United States Attorney, of counsel), *for Defendant-Appellant.*

JOEL R. DICHTER, New York, NY (Roger H. Briton, Seham, Klein & Zelman, New York, NY, of counsel), *for Plaintiff-Appellee.*

◆

MINER, *Circuit Judge*:

Defendant-appellant Richard L. Thornburgh, Attorney General of the United States, appeals from a preliminary injunction order entered in the United States District Court for the Southern District of New York (Patterson, Jr., *J.*) enjoining enforcement of a statute that prohibits providers of indecent telephone communications for commercial purposes from making their services available to persons under 18 years of age. The statute in question, the 1989 amendment to the Communications Act of 1934, 47 U.S.C. §§ 223(b) and (c), known as the Helms Amendment after its principal sponsor, establishes a "safe harbor" defense for providers that comply with telephone company presubscription procedures or engage in independent billing and collection. Plaintiffs-appellees characterize their business activities as "the dissemination, receipt and exchange of information by telephone" and refer to themselves as "electronic publishers" and "information providers." They are in fact purveyors of pornography and, as is to be expected, their challenge to the statute in this case is grounded in the first amendment.

The district court held as a matter of law that the term "indecent" in the statute is void for vagueness. The district court also held, in light of telephone company technical capabilities, that the presubscription method is not the least restrictive means for furthering the interest of the government in protecting minors from the harmful influences of pornography. Finally, the district court determined that the requirement for a system of presubscription or independent billing establishes an unconstitutional prior restraint on speech. On the basis of its void for vagueness holding, the district court issued a nationwide preliminary injunction against enforcement of the statute to the extent that it proscribes indecent communications for commercial purposes. We reverse.

BACKGROUND

Congress has been concerned for some time with the harmful effects of dial-a-porn messages upon the nation's children. In 1983 Congress amended the Communications Act of 1934 by adding a new subsection (b) to section 223 to proscribe making by telephone "any obscene or indecent communication for commercial purposes to any person under eighteen years of age." 47 U.S.C. § 223(b)(1)(A). That 1983 version of the statute established as a defense that access to the prohibited communications be restricted "to persons eighteen years of age or older in accordance with procedures which the [Federal Communication] Commission shall prescribe by regulation." 47 U.S.C. § 223(b)(2). The Commission adopted a regulation permitting access only between the hours of 9:00 p.m. and 8:00 a.m. or upon payment by credit card before transmission of the message. 49 Fed. Reg. 24,996 (1984). In *Carlin Comms., Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) ("*Carlin I*"), we invalidated the regulation, holding that it was not shown to provide the least restrictive means of protecting minors from the undesirable messages and that time channeling was underinclusive as well as overinclusive. *Carlin I*, 749 F.2d at 121-22. We also noted that credit card payment was feasible only in the case of live messages. *Id.* at 118-119.

When the Commission in 1985 adopted a regulation requiring dial-a-porn providers either to send messages only to adults who first obtain an access or identification code from the provider or to require payment by credit card before access is permitted, *see* 50 Fed. Reg. 42,699 (1985), we invalidated that regulation as well. We found "that the record [did] not support the FCC's conclusion that the access code requirement is the least restrictive means to regulate dial-a-porn." *Carlin Comms., Inc. v. FCC*, 787 F.2d 846, 855 (2d Cir. 1986) ("*Carlin II*"). It was our opinion that the Commission did not give adequate consideration to customer blocking device systems. "Accordingly, we remand[ed] to the Commission for exploration of the alternative of shifting the cost of customer premises blocking equipment to service providers and/or telephone companies." *Id.* at 856 (footnote omitted).

The 1987 regulation adopted by the Commission rejected the customer premises blocking technique, retained as defenses the use of access or identification codes and payment by credit card, and added as a defense the transmission of scrambled messages intelligible only by the use of a descrambling device. *See* 52 Fed. Reg. 17,760 (1987). We found the regulation valid but directed the Commission, in the event that a "less restrictive technology becomes available, . . . to reopen its proceedings to consider the costs and benefits of adding its use as an optional defense." *Carlin Comms., Inc. v. FCC*, 837 F.2d 546, 556 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) ("*Carlin III*"). We held the underlying 1983 statute constitutional upon a finding that the term "indecent" as used in the statute was to be given the meaning of "obscene" as defined in *Miller v. California*, 413 U.S. 15, 24 (1973). *Carlin III*, 837 F.2d at 560-61.

After our decision in *Carlin III*, Congress in 1988 enacted a new version of 47 U.S.C. § 223(b), prohibiting the making by telephone of "any obscene or indecent communication for commercial purposes to any person." Pub. L. No. 100-297, 102 Stat. 424. This new version of section 223(b) did not include a requirement for the Commission to issue regulations restricting access to those over 18 years of age, in view of the fact that access was barred to adults and children alike. The Supreme Court had no difficulty in upholding as constitutional the prohibition of obscene telephone messages, having "repeatedly held that the protection of the First Amendment does not extend to obscene speech." *Sable Comms. of California, Inc. v. FCC*, 492 U.S. 115, 124 (1989). The Court also saw no impediment to the use of the "contemporary community standards" formulation in the determination of obscenity, *see Miller*, 413 U.S. at 37, finding no constitutional barrier in the prohibition of communications obscene under some local standards but not under others: "If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Sable*, 492 U.S. at 126.

With respect to the ban on indecent communications, however, the Court determined that section 223(b) as revised was not drawn narrowly enough to serve the government's legitimate and compelling interest in protecting children from the harmful effects of indecent telephone conversations and therefore violated the First Amendment. *Id.* at 125. The Court found that "§ 223(b), in its present form, has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131. To deny adults access to indecent but not obscene telephone messages "far exceeds that which is necessary to limit the access of minors to such messages" and "does not survive constitutional scrutiny." *Id.*

Following *Sable*, Congress once again amended section 223 of the Communications Act in regard to restrictions upon live and recorded dial-a-porn messages. Pub. L. No. 101-166, tit. V, § 521(1), 103 Stat. 1159, 1192-93 (1989).[1] In its most recent incarnation, under the name of the Helms Amendment, section 223 prohibits making by telephone "any indecent communication for commer-

---

[1] (b) Prohibited commercial purposes; defense to prosecution

(1) Whoever knowingly—

(A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

shall be fined in accordance with title 18, United States Code, or imprisoned not more than two years, or both.

(2) Whoever knowingly—

(A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.

(4) In addition to the penalties under paragraph (1), whoever, within the United States, intentionally violates paragraph (1) or (2) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5)(A) In addition to the penalties under paragraphs (1), (2), and (5), whoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either—

(i) by a court, pursuant to civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(6) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1) or (2). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

(c) Restriction on access to subscribers by common carriers; judicial remedies respecting restrictions

(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) of this section from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

(2) Except as provided in paragraph (3), no cause of action may be brought in any court or administrative agency against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of—

(A) any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection; or

(B) any access permitted—

(i) in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b) of this section, or

(ii) because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b) of this section.

(3) Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action

cial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call." 47 U.S.C. § 223(b)(2)(A). The statute affords "safe harbor" defenses to those providers that "restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation." *Id.* § 223(b)(3). Subsection (c) does not impose any obligation upon providers, establishing instead a presubscription requirement upon telephone companies that collect providers' charges from subscribers:

> A common carrier . . . shall not, to the extent technically feasible, provide access to a [dial-a-porn message] from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge . . . that the carrier remits, in whole or in part, to the provider . . . .

Id. § 223(c)(1).

The new Commission regulations referred to in subsection (b) allow providers to invoke the statutory defense by giving written notice to the telephone company that they are providing covered communications and by either (1) requiring payment by credit card

---

shall be limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only to subscribers who have previously requested such access.

before the message is transmitted, (2) requiring an authorized access or identification code before transmission or (3) scrambling the message so that it is comprehensible only to one using a descrambler. *See* 55 Fed. Reg. 28,915 (to be codified at 47 C.F.R. § 64.201).

Seeking a declaratory judgment that the Helms Amendment violates the first and fifth amendments to the U.S. Constitution as well as preliminary and permanent injunctive relief against its enforcement, plaintiffs filed the complaint in this action on March 14, 1990. Following some expedited discovery in connection with plaintiffs' motion for a preliminary injunction, the district court held six days of evidentiary hearings on the motion. The hearings focused on the question of whether the presubscription provision in the statute is an appropriately tailored means of protecting children from dial-a-porn. The district court "refrain[ed] from consolidating those hearings with a trial on the merits of plaintiffs' request for a permanent injunction . . . in deference to the government's request for time to gather additional evidence before a trial." *American Info. Enters. v. Thornburgh*, 742 F. Supp. 1255, 1257 (S.D.N.Y. 1990). The district court recognized that it was without jurisdiction to review the constitutionality of the FCC regulations, *see* 28 U.S.C. § 2342(1), and therefore announced:

> [T]he only restriction on indecent speech which this Court will review are the statute's effect of limiting [a provider's] communication of indecent speech over telephone lines by causing [the provider] either to engage in billing and collection independent of the telephone company or to be subject to compli-

> ance with the telephone company's implementation of a system of written pre-subscription.

742 F. Supp. at 1259.

After reviewing the constitutional challenges to the statute, the district court arrived at the following conclusion in its opinion dated August 10, 1990:

> There is a likelihood that plaintiffs will succeed on the merits of their claims that the Helms Amendment (1) violates the First Amendment by failing to employ the least restrictive means to effect a compelling government interest, (2) violates the First and Fifth Amendments under the void for vagueness doctrine, and (3) violates the First and Fifth Amendments by containing a prior restraint unaccompanied by adequate procedural safeguards. Thus the enforcement of the Helms Amendment presents a threat of imminent irreparable harm to First Amendment freedoms.

Id. at 1275. In an order of preliminary injunction dated August 29, 1990, the district court enjoined the Attorney General, "pending the final determination of this action or until the Court otherwise orders, from in any manner or by any means enforcing or implementing the Helms Amendment to the extent it proscribes, regulates or otherwise affects any 'indecent communication for commercial purposes.' "

DISCUSSION

A. *The Void For Vagueness Issue*

The Supreme Court in *Sable* recognized "the compelling interest of preventing minors from being exposed to indecent telephone messages." *Sable*, 492 U.S. at 131. Accordingly, the district court in the case at bar did not call into question the power of Congress to regulate indecent telephone communications involving children, noting that it was addressing only "the separate issue of the meaning of indecent telephone speech, an issue not directly addressed by the *Sable* Court." *American Information Enterprises*, 742 F. Supp. at 1267 n.16. Applying to the Helms Amendment the "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), the district court resolved the issue as follows:

> Without any additional specificity, the term "indecency" on its own is too vague to pass constitutional muster. The term indecency does not inherently contain within it a reference to specifically defined conduct, as does the term "obscenity." . . . Moreover, the term does not appear in the context of a specific definition of conduct . . . . The statute and regulations only make a person of common intelligence aware that "offensive" communications are to be restricted.

American Information Enterprises, 742 F. Supp. at 1271 (citations omitted).

The district court erred. "Indecent," as used in the Helms Amendment, has been defined clearly by the Federal Communication Commission pursuant to its statutory direction to prescribe by regulation procedures for preventing access to dial-a-porn by minors. 47 U.S.C. § 223(b)(3). This definition was developed during the notice-and-comment rulemaking process in response to a void for vagueness contention similar to that made here:

> [I]n the dial-a-porn context, we believe it is appropriate to define indecency as the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium.

In re Regulations Concerning Indecent Communications by Telephone, Gen. Dkt. No. 90-64, ¶ 12 (Report and Order, released June 29, 1990) (hereafter *FCC Report and Order*). The foregoing interpretation, by the agency charged with the administration of the statute, was not accorded the weight to which it was entitled by the district court. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

It is noteworthy that the Commission's most recent definition of "indecent" tracks one that it developed in the radio broadcast context and that passed muster in the Supreme Court:

> [T]he concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

FCC v. Pacifica Found., 438 U.S. 726, 731-32 (1978) (quoting FCC opinion).

Since *Pacifica* implicated the broadcast medium, rather than the telephone medium, the district court found "that it cannot be assumed that the *Pacifica* definition of 'indecent' applies here." 742 F. Supp. at 1271 (footnote omitted). According to the district court, the FCC merely was "assuming" that this definition would be "what courts will find 'indecent' to mean in [the] Helms Amendment." *Id.* at 1269. It is clear, however, that the FCC was not predicting what courts would do. Rather, it was defining a term contained in a statute it was required by Congress to administer. This is no less so because it was following an earlier FCC definition embraced in a court decision relating to the broadcast medium. Accordingly, the term "indecent" as used in the Helms Amendment is sufficiently defined to provide guidance to "the person of ordinary intelligence" in the conduct of his affairs. *Grayned*, 408 U.S. at 108. Under the circumstances, appellees' vagueness challenge must be rejected. *See Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. May 17, 1991) (1991 U.S. App. LEXIS 9873, at *11); *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874-76 (9th Cir. 1991); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988).

B. *The Least Restrictive Means Issue*

The government is empowered to "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126. The compelling interest in protecting minors from the harms concededly generated by indecent telephone messages that may not be obscene by adult standards having been established, the question of the least restrictive means of achieving the compelling interest must be resolved. "It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.* Accordingly, in order for appellees to prevail, it must be determined that there are other approaches less restrictive than the Helms Amendment but just as effective in achieving its goal of denying access by minors to indecent dial-a-porn messages. The district court determined that "New York's current voluntary blocking system is adequately protective of children and is less restrictive than either a pre-subscription requirement or an independent billing mechanism." 742 F. Supp. at 1264. We disagree.

Under voluntary blocking, a system approved by the New York Public Service Commission, any subscriber can have sexually explicit telephone communications centrally blocked by contacting the telephone company and requesting such a service, which is free of charge. Central blocking is accomplished when the telephone company, having assigned a three digit prefix to certain types of providers, blocks a household's access to all numbers with that prefix. A parent who receives a bill from the telephone company for dial-a-porn messages thereby receives notice that calls are being made by a child in the household and may request central blocking.

It seems to us that voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn billed by the telephone company as would the presubscription requirement of the Helms Amendment. Blocking has been available for over two years in the New York area, but only four percent of the 4.6 million residential telephone lines in the area having access to the 970 prefix assigned by the telephone company for adult messages have been blocked. According to an "Awareness Study," half of the residential households in New York are not aware of either the availability of dial-a-porn or of blocking. Moreover, in the opinion of a psychiatrist who testified at the preliminary injunction hearing, a child may have suffered serious psychological damage from contact with dial-a-porn before the child's parents become aware from a monthly telephone bill that there has been access to an indecent message. Common sense dictates that a presubscription requirement, like requirements for payment by credit card before a message is transmitted, for use of an authorized access or identification card before transmission, and for a descrambling device for scrambled messages, is more likely to achieve the goal sought than blocking after one or more occasions of access. It always is more effective to lock the barn *before* the horse is stolen.

The district court found "that pre-subscription would be more restrictive on listeners and [providers] than the current voluntary blocking system in place in New York" after noting "the added expense" and "loss of customers" that the providers would sustain by reason of this billing method. 742 F. Supp. at 1263-64. Prepayment and credit card billing are subject to the same economically inhibiting factors as presubscription, according to the district court, which "essentially agree[d] with the government's expert 'that N.Y. Tel. is generally the most profitable billing method available for dial-a-porn companies.' " *Id.* at 1264. With respect to independent billing by the providers, the district court concluded that the costs thereof "would to some extent reduce the number of [providers], make the unit calls more costly, and to some extent exclude callers." *Id.* (footnote omitted). All of this is to say that, for those who furnish dial-a-porn messages, voluntary blocking is the least economically restrictive and therefore the most desirable means of regulation.

The error of the district court lies in focusing on means, when the focus should be on goals as well as means. The goal here is to prevent access to indecent messages by children. The means must be effective in achieving the goal. Even if voluntary blocking is assumed to be the least restrictive means of accomplishing the congressional purpose, it clearly is not an effective means. To the extent that the district court found that voluntary blocking was not ineffective, 742 F. Supp. at 1266, its finding was clearly erroneous. Voluntary blocking simply does not do the job of shielding minors from dial-a-porn.

We note that in brushing aside the testimony of Dr. Dietz that even minimal exposure to indecent messages can have damaging psychological effects on children, who would be able to gain access before voluntary blocking could be effectuated, the district court found only that the testimony failed to demonstrate "that more than 'a few of the most enterprising and disobedient young people [can or are] manag[ing] to secure access to such [indecent telephone] messages,' despite the presence of a voluntary blocking scheme." *Id.* (quoting *Sable*, 492 U.S. at 130) (bracketed material in *American Information Enterprises*). We think that the testimony has considerably more significance. It demonstrated the ineffectiveness of voluntary blocking; the effectiveness of presubscription as a means of preventing access by minors before any harm can be done; and the importance of the congressional goal. As to the district court's reference to disobedient young people, "parents and others . . . who have th[e] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). The Helms Amendment is such a law, "narrowly tailored to serve [a compelling] interest." *Boos v. Barry*, 485 U.S. 312, 324 (1988).

C. *The Prior Restraint Issue*

In deciding that there is a likelihood that appellees will succeed on their claims that the Helms Amendment violates the First and Fifth amendments by providing a prior restraint without adequate procedural safeguards, the district court observed that "[s]ection 223(c)(1) requires common carriers to categorize, as either indecent or decent, the content of speech made by [providers] that use a carrier's billing systems." 742 F. Supp. at 1271 (footnote omitted). According to the district court, the effect of this requirement and of the consequent imposition of "a system of pre-subscription or independent billing . . . is to restrict the future communication of [protected] speech." *Id*. at 1272.

The district court erred in concluding that the statute requires carriers to classify which messages are indecent. The statute actually provides that the dial-a-porn provider must inform the telephone company that the message is indecent and therefore covered by the statute, in order to activate the presubscription provision. *See* 47 U.S.C. § 223(c)(2)(B)(i). This indeed is the interpretation of the FCC, the agency charged, as previously noted, with the enforcement of the statute. *See FCC Report and Order*, ¶ 36. The schemes that have been invalidated by the Supreme Court as prior restraints on speech "had

THIS PAGE LEFT BLANK INTENTIONALLY

this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975); *see Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989). Only where the government imposes a requirement of advance approval or seeks to enjoin speech can there be prior restraint. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971). That is not the case here. The Helms Amendment requires no one except dial-a-porn providers to classify their messages, and therefore it cannot be said to operate as a prior restraint on speech. The carriers themselves are not state actors but private companies. *See Information Providers' Coalition*, 928 F.2d at 877.

After examining the rules of the New York Public Service Commission, the district court concluded that, but for the Helms Amendment, presubscription and independent billing would be prohibited and thus that "any decision by a carrier in New York to restrict indecent telephone speech through imposing pre-subscription or independent billing will be the products of the Helm Amendment and therefore are attributable to that statute and not private action." 742 F. Supp. at 1273. A finding of state action on this basis is unwarranted. The Helms Amendment does not require the telephone company to implement the presubscription method of billing, unless the company voluntarily has chosen to provide billing services for providers. The Public Service Commission has adopted no rule requiring the telephone company to provide billing and collection services. The telephone company does not act under governmental compulsion either when it undertakes or refuses to undertake dial-a-porn billing. Accordingly, it cannot be a state actor when it implements a presubscription bill-

ing system. *See Carlin Comms., Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988); *Carlin Comms., Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1357-61 (11th Cir. 1986).

Finally, even if the telephone company were seen as a state actor, the Helms Amendment cannot be said to operate as a prior restraint on speech. There is no restraint of any kind on adults who seek access to dial-a-porn. A requirement that one desiring access make an advance request therefor simply does not constitute a prior restraint. The telephone company has no right to review the content of dial-a-porn messages. The Helms Amendment requires only that subscribers state in advance their desire to obtain such messages.

CONCLUSION

The judgment of the district court is reversed, and the matter is remanded for the entry of judgment denying the motion for a preliminary injunction.

ORDER OF PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
90 Civ. 1719 (RPP)

DIAL INFORMATION SERVICES CORP. of NEW YORK;
FABULOUS ASSOCIATES, INC,; SOURCE COMMUNICATIONS, INC.;
and TELE-PRO COMMUNICATIONS CORP.,
Plaintiffs,

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL
of the UNITED STATES,
Defendant.

This cause came to be heard on plaintiff's motion for a preliminary injunction and the court having considered the complaint, the affidavits and memoranda of law submitted in support of said motion and in opposition thereto, the evidence presented at hearings conducted on March 20, 1990 and May 9, 10, 14, 15, and 16, 1990 at which all parties were given the opportunity to present oral and documentary evidence, the post-hearing memoranda of law and post-hearing correspondence with the Court, and the Court having filed an Opinion and Order dated August 13, 1990 granting the motion for a preliminary injunction, and it appearing to the Court after due deliberation, for the reasons stated in its August 13, 1990 Opinion and Order, that there is a likelihood that plaintiffs will succeed on the merits of the claim that the portion of the 1989 amendment to the Communications Act of 1934, 47 U.S.C. §§ 223(b) and (c) ("the Helms Amendment") which proscribes, regulates or otherwise affects the communication of "indecent" speech over the telephone but not to the extent it proscribes any "obscene communication for commercial purposes", (1) violates the First Amendment by failing to employ the least restrictive means to effect a compelling government interest, (2) violates the First and Fifth Amendments under the void for vagueness doctrine, and (3) violates the First and Fifth Amendments by containing a prior restraint unaccompanied by adequate procedural safeguards, and that the enforcement of the Helms Amendment presents a threat of irreparable harm to the First Amendment freedoms of plaintiffs and others, IT IS HEREBY:

ORDERED, pursuant to F.R.C.P. Rule 65(a) that defendant Richard L. Thornburgh, Attorney General of the United States, his agents, employees, and attorneys and all persons in active concert and participation with him be and they hereby are restrained and enjoined, pending the final determination of this action or until the Court otherwise orders, from in any manner or by any means enforcing or implementing the Helms Amendment to the extent it proscribes, regulates or otherwise affects any "indecent communication for commercial purposes," But not to the extent it proscribes any "obscene communication for commercial purposes," and it is further

ORDERED, that this preliminary injunction be granted without condition that a bond be filed by plaintiffs because issuance of the preliminary injunction will maintain the *status quo* and is not likely to result in measurable pecuniary harm to defendant.

Dated: Aug. 9, 1990
NYC, NY

United States District Judge

OPINION AND ORDER
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN INFORMATION ENTERPRISES, INC,; DIAL INFORMATION SERVICES, CORP. of NEW YORK; FABULOUS ASSOCIATES INC.; and TELE-PRO COMMUNICATIONS CORP.,
Plaintiffs,

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL of the UNITED STATES,
Defendant.

No. 90 Civ. 1719 (RPP).

United States District Court,
S.D. New York.

Aug. 13, 1990.

OPINION AND ORDER

ROBERT P. PATERSON, Jr., District Judge.

Plaintiffs move, pursuant to Federal Rule of Civil Procedure 65(a), for a preliminary injunction enjoining the enforcement of that portion of the 1989 amendment to the Communications Act of 1934, 47 U.S.C. §§ 223(b) and (c) ("the Helms Amendment"), which regulates the communication of "indecent" speech over the telephone. Plaintiffs, who refer to themselves as "information providers" ("IP's"), operate various types of commercial telephone services, which offer listeners, either exclusively or in part, a sexually explicit content. Plaintiffs claim that the Helms Amendment violates the First and Fifth Amendments to the Constitution.[1] The Court held evidentiary hearings on March 20, 1990 and May 9, 10, 14, 15, 16, 1990 on the merits of preliminary injunctive relief. The Court refrains from consolidating those hearings with a trial on the merits of plaintiffs' request for a permanent injunction, pursuant to Federal Rule of Civil Procedure 65(a)(2), in deference to the government's request for time to gather additional evidence before a trial.

I. The Helms Amendment's Restrictions on Indecent Speech

The Helms Amendment sets forth civil and criminal penalties for the knowing transmission of obscene and indecent communications by means of telephone. The portion of 47 U.S.C. § 223, of which plaintiffs seek to enjoin the enforcement, is as follows:

> (b) PROHIBITED COMMERCIAL PURPOSES; DEFENSE TO PROSECTION
>
> (1) [bans obscene communications]....
>
> (2) Whoever knowingly—
>
> (A) within the United States, by means of telephone, makes (directly or by recording device) and *indecent communication for commercial purposes* which is available to any person under 18 years of age or any other person without that person's consent, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both

---

[1] Appearing as amicus curiae are the New York Civil Liberties Union, VV Publishing, Inc., and LAMBDA Legal Defense and Education Fund, Inc.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the [Federal Communications] Commission may prescribe by regulation.

(4) In addition to the penalties under paragraph (1), whoever, within the United States, intentionally violates paragraph (1) or (2) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5)(A) In addition to the penalties under paragraphs (1), (2), and (5), whoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either—

(i) by a court, pursuant to civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(6) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1) or (2). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

(c) RESTRICTION ON ACCESS TO SUBSCRIBERS BY COMMON CARRIERS; JUDICIAL REMEDIES RESPECTING RESTRICTION

(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b)

of this section from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

(2) Except as provided in paragraph (3), no cause of action may be brought in any administrative agency against any common carrier,or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of–

(A) any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection; or

(B) any access permitted–

(i) in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b) of this section, or

(ii) because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b) of this section.

(3) Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action shall be limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only- to subscribers who have previously requested such access.

47 U.S.C.A. § 223(b) and (c) (Supp.1990) (emphasis added).

Pursuant to Section 223(b)(3), if an IP complies with both the restrictions set forth in Section 223(c) and the regulations promulgated by the Federal Communications Commission (FCC), then that IP can communicate indecent speech without being subject to criminal or civil penalties. The restriction set forth by Section 223(c)(1) is that a common carrier (*i.e.*, the telephone company) either must refrain from engaging in billing and collection for an IP or else the telephone company must limit access to the IP to those telephone customers who have presubscribed in writing requesting access to the IP's services.

The FCC regulations, adopted in June 1990 and to become effective August 14, 1990, further provide that IP's can only qualify for the safe harbor from the Section 223(b)(2)'s penalties for indecent communications if: (1) the IP has notified the common carrier in writing that he or she is providing a telephone service with an indecent content; and (2) the IP either (a) "[r]equires payment by credit card before transmission of the message;" (b) "[r]equires an authorized access or identification code before transmission of the message"; or (c) "scrambles the message using any technique that renders the audio unintelligible and incomprehensible to the calling party unless that party uses a descrambler." 47 C.F.R. 64.201((a), reprinted in, *In re Regulations Concerning Indecent Communications by Telephone*, Gen. Docket No. 90-64, Report and Order, released June 29, 1990 [hereinafter cited as "Report and Order"].

All parties agree that this Court does not have jurisdiction to review the constitutionality of the FCC regulations, pursuant to 28 U.S.C. § 2342(1) which grants Circuit Courts exclusive jurisdiction "to enjoin ... or to determine the validity of" final regulations ordered by the FCC. Accordingly, the only restriction on indecent speech which this Court will review are the statue's effect of limiting an IP's communication of indecent speech over telephone lines by causing IP's either to engage in billing and collection independent of the telephone company or to be subject to compliance with the telephone company's implementation of a system of written pre-subscription.

II. Justiciability

A. *Extent of Plaintiffs' Standing*

Both sides have stipulated before the Court that plaintiffs represent the constitutional interests of their listeners, as well as their own interests as speakers. The Supreme Court made a similar recognition in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed2d 371 (1969), where, even though the plaintiff was the corporate speaker rather than the listener, it rested its decision in part on "the [First Amendment] right of *the public* to receive suitable access." *Id.* at 390, 89 S.Ct. at 1806 (emphasis added); *see also Virginia State Pharmacy Board v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 1822-23, 48 L.Ed.2d 346 (1976); *Kleindienst v. Mandel,* 408 U.S. 753, 762-63, 92 S.Ct. 2576, 2581-82, 33 L.Ed.2d 683 (1972) (surveying history of First Amendment right of listeners).

B. *Ripeness*

[1] In a challenge to a prior version of the Helms Amendment, the Second Circuit held that a determination of whether the challenge is ripe depends upon "'a twofold inquiry evaluation the hardship to the parties of withholding judicial determination and evaluating whether the issues are fit for judicial determination.'" *Carlin Communications, Inc. v. FCC,* 749 F.2d 113, 123 n. 20 (2d Cir.1984) [hereinafter *Carlin I*] (quoting *Seafarers Int'l Union v. United States Coast Guard*, 736 F.2d 19, 26 (2d Cir.1984)). The Court finds that the case is ripe because plaintiffs allege that the statute is directly aimed at constitutionally protected speech and their business interest,

see Roe v. Meese, 689 F.Supp. 344, 345 (S.D.N.Y.1988) (analogous challenge to constitutionality of earlier version of Helms Amendment) (citing *Virginia v. American Booksellers Association, Inc.,* 484 U.S. 383, 108 S.Ct. 636, 642, 98 L.Ed2d 782 (1988) ("injury in fact" requirement in First Amendment context)), and because enforcement of the statue is now imminent.

By letter dated March 19, 1990 the government informed the Court that it would refrain from enforcing the statute until the FCC promulgated regulations in connection with the statute. The FCC regulations appeared in the Federal Register on July 16, 1990 and stated that on August 15, 1990 the regulations would become effective. 55 Fed.Reg. 28,915 (1990). Accordingly, there is an imminent threat of enforcement of the Helms Amendment as of August 15, 1990 and this First Amendment challenge is ripe for judicial determination.

III. Preliminary Injunction Standard

In the Second Circuit, a part seeking injunctive relief must establish: (1) that the injunction is necessary to prevent irreparable harm and (2) either (a) a likelihood of prevailing on the merits of the case or (b) the existence of both (i) sufficiently serious questions going to the merits as to make them a fair ground for litigation and (ii) a balance of the hardships tipping decidedly toward the movant. *Reuters Limited v. United Press International, Inc.,* 903 F.2d 904, 907 (2d Cir.1990) (citations omitted). The Second Circuit also holds that:

> where the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes,

> along with irreparable injury, a likelihood of success on the merits of his claim.

Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 580 (2d Cir.1989). The actions to enforce the Helms Amendment would be taken in the public's interest in protecting minors. Accordingly, the Court follows *Plaza Health* and determines whether to grant this preliminary injunction based on whether plaintiffs have established (1) that there is an imminent threat of irreparable harm and (2) that there is a likelihood that plaintiffs will succeed on the merits.

IV. Irreparable Harm

[2] The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976). Thus, if plaintiffs show that the enforcement of the Helms Amendment either violates the First Amendment, or infringes on First Amendment rights and interests protected by the Fifth Amendment's due process clause, then plaintiffs will have demonstrated irreparable injury. The Court will examine the likelihood of plaintiffs prevailing on their claims that there will be a loss of First Amendment freedoms because (1) the statute does not employ the least restrictive means to effect a compelling government interest; (2) the statute is void for vagueness; and (3) the statute contains a system a prior restraint unaccompanied by adequate procedural safeguards.

V. Likelihood of Success on The Merits

A. *First Amendment*

1. Content or Content Neutral

The First Amendment states in pertinent part: "Congress shall make no law ... abridging the freedom of speech." The government does not dispute that "indecent communication for commercial purposes" "by means of telephone" is "speech" and therefore the Helms Amendment implicates the First Amendment.

The threshold issue in this First Amendment scrutiny of the Helms Amendment is whether it is a content-based or content neutral regulation of speech.

[3] A restriction on speech is content neutral if it can be "'justified without reference to the content of the regulated speech.'" *United States v. Eichman,* — U.S.—, 110 S.Ct. 2404, 2409, 110 L.Ed.2d 287 (1990) (quoting *Boos v. Barry,* 485 U.S. 312, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988)); *Young v. New York City Transit Authority,* 903 F.2d 146, 158 (2d Cir.1990) ("the real question is whether the dangers relied on as justification for the regulation arise *at least in some measure* from the alleged communicative content of the conduct") (emphasis added).

In *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Supreme Court scrutinized a zoning ordinance restricting the possible locations of "threatres specializing in adult films." *Id.* at 47, 106 S.Ct. at 928. Justice Rehnquist, writing for the majority, held that the ordinance was content neutral because its justification was based upon the "secondary effects of such theatres in the surrounding community," *ibid.*, such as the devaluation of property, an increase in crime and the deterioration of the residential character of an area.

Here, the justification for the Helms Amendment is the psychological impact of indecent telephone speech on minors. Such a justification is not content neutral. It constitutes a primary rather than a secondary effect. Justice O'Connor, writing for the Supreme Court in *Boos v. Barry*, recognized that if the regulation in *Renton* had been "justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies then analysis of the measure as a content-based statute would have been appropriate." 108 S.Ct. at 1163. *See Also* 108 S.Ct. at 1171 (Brennan, J., concurring) ("Whatever 'secondary effects' means, ... it cannot include listeners' reactions to speech.") (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)). Accordingly, as a regulation aimed at the content of indecent telephone speech, the Helms Amendment's procedural mechanisms and substantive terminology must be scrutinized. *See Sable Communications of California, Inc. v. FCC*, —U.S.—, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989) (regulation of indecent commercial telephone communications is a regulation of the "content of constitutionally protected speech").[2]

---

[2] The finding that *Renton's* content-neutral analysis does not govern this scrutiny of content-based restrictions also means that *Renton's* holding that the First Amendment does not protect against economic hardship does not apply here. *See Renton*, 475 U.S. at 54, 106 S.Ct. at 932. A content-neutral restriction is constitutional as long as it enables the restricted speaker to have "a reasonable opportunity to open and operate an adult theatre within the city." *Id.* On the other hand, a content regulation, is only constitutional if it is the least restrictive means of accomplishing a compelling government interest. *See Infra.* Economic impact is a factor in determining which means of regulation are the least restrictive. *See, e.g., Fabulous Associates v. Pennsylvania Public Utility Commission*, 896 F.2d 780, 785-87 (3d Cir.1990) (giving weight to costs imposed on IP's by regulations on indecent telephone speech) (citing *Murdock v. Pennsylvania*, 319 U.S. 105,

(continued...)

2. Compelling Government Interest and Least Restrictive Means

[4] The First Amendment permits Congress to enact content-based regulations of indecent speech communicated by telephone for commercial purposes if the statute sets forth the least restrictive means of accomplishing a compelling government interest. *Sable*, 109 S.Ct. at 2836.

[5] The legislative history of the Helms Amendment states that the intention of the statute is to protect the psychological well-being of minors. This purpose is a compelling interest and justifies a restriction on indecent speech.[3] *Sable*, 109 S.Ct. at 2836; *see also Osborne v. Ohio*, ——U.S.——, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). Accordingly, the issue is whether the least restrictive means of preventing minors from obtaining access to indecent commercial telephone communications are embodied in the statute's requirement that an IP either engage in billing and collection independent of the carrier or subject itself to a presubscription requirement. The least restrictive means test requires that the Court review each technologically feasible option and determine whether the government has met its burden of showing that it has chosen the effective option which is the least restrictive. *See Carlin I*, 749 F.2d at 121 ("The government bears the heavy burden of demonstrating that a compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression."). A

---

[2](...continued)
63 S.Ct. 870, 87 L.Ed. 1292 (1943) ("the First Amendment is not available 'merely to those who can pay their own way.'")).

[3] In addition, the government presented the expert testimony of Dr. Park Dietz on the possible psychological harms resulting from a child's exposure to some of the sexually explicit telephone messages marketed by IP's. The Court intimates no opinion on whether the messages discussed by Dr. Dietz are "obscene" or "indecent," because that issue is not before the Court.

regulation on indecent telephone communications is considered to be effective in its protection of minors even though it permits "a few of the most enterprising and disobedient young people ... [to] manage to secure access to such messages." *Sable*, 109 S.Ct. at 2838.

Plaintiffs argue that it is likely that the government will not be able to meet its burden at trial of rebutting plaintiffs' contention that the system for restricting minors' access to indecent telephone communications which is currently in use in New York State, if properly publicized and implemented, would be effective and less restrictive than the means set forth in the Helms Amendment. The New York Public Service Commission has instituted a system called voluntary blocking. Under this system, any household can have its access to sexually explicit telephone services, as well as other commercial telephone services, blocked free of charge by contacting the telephone company and requesting central blocking. The telephone company is able to implement such a system by assigning certain types of telephone services the same three digit prefix and then centrally blocking a household's access to all numbers with that prefix.[4] In addition, access to the services are permanently blocked from all payphones and from telephones outside of New York State. New York Telephone also will centrally block a telephone if there have been two complaints about a bill for charges for calls to adult telephone services. Since such charges appear itemized on New York's telephone bills, a parent receives notice that such calls are being made. In addition, if a parent calls to dispute or complain about an adult service telephone charge which appears on the bill then the customer representative will discuss the availability of central blocking. Tr. 382.

---

[4] Although on New York's 970 prefix there are currently non-sexual services, such as lottery results, it is feasible to put the adult services exclusively on one prefix. Tr. 383.

While restrictions on access to indecent telephone communications have been subject to detailed scrutiny by the Second Circuit on three occasions, *see Carlin Communications, Inc. v. FCC,* 837 F.2d 546(2d Cir.) [hereinafter *Carlin III*], cert. denied 488 U.S. 924, 109 S.Ct. 305, 102 L.Ed.2d 324 (1988); *Carlin Communications, Inc. v. FCC,* 787 F.2d 846 (2d Cir.1986) [hereinafter *Carlin II*]; *Carlin I, supra;* the voluntary blocking option has yet to be reviewed because at the time of *Carlin III* it was still technologically infeasible.[5] *See Fabulous Associates, Inc.,* 896 F.2d at 788 n. 7; *Carlin II,* 749 F.2d at 851. In the Third Circuit's more recent "least restrictive means" review of Pennsylvania's regulation of indecent telephone communications, the voluntary blocking option was only referred to, along with the pre-subscription with the telephone company option, as less restrictive than the option of requiring a caller to obtain an access code from the IP. *See Fabulous Associates, Inc., supra.* Although the Third Circuit found that the pre-subscription and voluntary blocking option were effective means of satisfying the state's interest in protecting minors, the Circuit Court did not evaluate the comparative restrictiveness of the two options.

This is the first time that a court has been asked to evaluate the comparative restrictiveness and effectiveness of the option of voluntary blocking as opposed to the option of either implementing pre-subscription or engaging in independent billing and collection. The Supreme Court instructs that in this scenario the judiciary's usual "'[d]eference to legislative findings cannot limit judicial inquiry [because] ... First Amendment rights are at state.'" *Sable,* 109 S.Ct. at 2838 (quoting

---

[5] The discussions of "blocking" in *Carlin II* and *Carlin III* refer to "home based blocking" which operates through the installation of equipment in one's telephone. The Second Circuit rejected "home based blocking" as costly and ineffective, because the device could easily be taken apart by a child.

Landmark Communications v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d I (1978)).

The government's case here is made difficult because, as in *Sable*, the "congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means." *Sable*, 109 S.Ct. at 2838. The Helms Amendment emerged from the Senate in the waning days of a congressional session. No committee reviewed the bill and the Senate "only had a few minutes to consider" the proposed bill. *See* Cong.Rec. S15796, S15800 (daily ed. Nov. 16, 1989) (remarks of Sen Spector). Senator Spector noted that "the last time the issue of dial-a-porn was presented to the Congress it was an amendment very much in this posture, without being carefully and deliberately crafted to ensure it would pass constitutional muster." Cong. Rec. S15796 (Nov. 16, 1989). That statute was struck down in *Sable* because the government could not satisfy its burden of demonstrating that the statute embodied the least restrictive means of effecting the government's compelling interest. With respect to the 1989 Helms Amendment, Senator Spector attempted to compensate by proposing a "colloquy for purposes of legislative history ... to do our very best to satisfy the Supreme Court. " Cong.Rec. S15800 (Nov. 16, 1989). However, the ensuing colloquy failed to provide what the Supreme Court had asked Congress for in *Sable:* "evidence of *how* effective or ineffective" various options for restricting access to minors might prove to be. 109 S.Ct. at 2838. There were neither hearings nor presentations of reports. Senator Helms supported his Amendment with references to the degeneracy of the Roman Empire, *see* Cong.Rec. S15794 (daily ed, Nov. 16, 1989), but failed to provide the concrete findings on different regulatory options that the *Sable* Court mandated.

The Court must look elsewhere than Congress to determine if the government's burden has been satisfied. The FCC

Report and Order in regard to the regulations accompanying the bill recognizes that "the addition of a defense [in Section 223(c)] for [implementing a system of voluntary] blocking would undoubtedly be less burdensome for dial-a-porn providers, but ... it would be insufficient to achieve realistically the goal of the statute: protection of children." Report and Order at 7, ¶ 17 n. 17. The FCC, which did hold hearings before issuing its report, cites three reasons why voluntary blocking would be ineffective: (1) children will still be able to access such messages from other area codes; (2) children will still be able to access such messages from payphones; and (3) a telephone in a home or other location where the blocking option has not been exercised will still be accessible to a child. The first problem can be addressed technologically by telephone companies blocking access from other area codes, a slight change from New York's current blocking of access from out-of-state area codes, and the second problem can be addressed by such companies utilizing New York's restriction of access from payphones. *See also Carlin II*, 787 F.2d at 848-49 ("any solution to the dial-a-porn problem would not necessarily be rendered unacceptable merely because it did not cover coin calling" because few minors have enough money to afford coin calling and there is evidence that very few calls to IP's are received from payphones). As to the FCC's third problem, the same risk of a child going over to a friend's house exists under the pre-subscription scheme. The FCC Report and Order is also unpersuasive because it cites little factual basis and makes no findings.[6]

The government contends that despite the lack of evidence in government reports, the evidence presented at the preliminary injunction hearing supports its contention that the statute's options of pre-subscription and independent billing mechanisms embody the least restrictive, effective means.

---

[6] The hearings and FCC testimony discussed in *Sable*, 109 S.Ct. at 2838, pre-date the technological advances permitting voluntary central blocking.

a. Pre-subscription

The government's Post-Trial brief concedes:

> [T]he pre-subscription requirement would put plaintiffs to certain costs [that they do not have to endure under New York's current voluntary blocking scheme]: for example, the costs of producing and distributing simple consent forms that individuals could submit to carriers, the costs of a marketing campaign to encourage pre-subscription, lost investments where their present equipment is incompatible with alternative operating procedures, or even an ultimate loss of some customers. ...

Gov. Post-Trial Mem. at 56. Thus, the added expense to the plaintiffs which the Helms Amendment will cause is admitted and a loss of customers appears likely.

In the government's survey of households which had used sexually explicit telephone services in the preceding month, more than 70 percent responded that they were not "very likely" to pre-subscribe and more than 60 percent responded that they were not "very likely or somewhat likely" to pre-subscribe.[7] Gov.Ex.L. New York Telephone has projected that implementation of pre-subscription would result in a reduction of over 7,000,000 calls annually. Pl.Ex.11. And the owner of plaintiff, American Information Enterprises testified that, "the greater majority of people will be put out of business" by the pre-subscription requirement and the resulting reduction in total calls received and billed.[8] Liebowitz Dep. at 84-85.

---

[7] Even if the government expert is correct that the results of the survey reveal 40 to 50 percent under-reporting, the survey still reveals that there would be a significant inhibition factor resulting from pre-subscription.

It is unlikely that pre-subscription would cause the elimination of all of plaintiffs' businesses. The 1989 Pennsylvania pre-subscription requirement, which drove IP's out of business or forced them to change their content, was accompanied by virtually no marketing efforts. However, the evidence does support a finding that pre-subscription would be more restrictive on listeners and IP's than the current voluntary blocking system in place in New York.

b. Independent Billing and Collection

The government contends that the independent billing alternative is an effective means of pursuing the purpose of the Helms Amendment if billing methods such as pre-subscription, pre-payment or credit-card billing are utilized. The government has presented no evidence that pre-payment would be any less restrictive than pre-subscription. Plaintiffs presented opinion testimony that pre-subscription would be a burden because their customers prefer to call on impulse. The evidentiary value of such statements is questionable, but in any event this same inhibiting factor would be present with pre-payment. *See also Carlin II*, 787 F.2d at 856 n. 7 (noting "chilling effect of a written application and identification procedure").[9]

As for credit card billing, advertisements for IP's currently operating exclusively through credit card sales show that a number of IP's exist through credit card billing. The plaintiffs presented evidence showing that credit card billing is more costly and offered opinion evidence that it would exclude that portion of the public who do not have plastic money.

---

[8] It cannot be ascertained what percentage of calls currently received are stimulated by latent curiosity or are made by practical joke callers. Pre-subscription would undoubtedly reduce such calls.

[9] There was also testimony from an owner of an IP that he placed an advertisement for a prepayment system and received no response. Liebowitz Dep. at 28. This testimony also has limited evidentiary value.

The Court essentially agrees with the government's expert "that N.Y.Tel. is generally the most profitable billing method available for dial-a-porn companies," Gov. Post-Trial Mem. at 34, and finds that despite the additional cost of independent billing and collection, the IP industry would survive if independent billing were made mandatory.[10] However, the costs of independent billing mechanisms would to some extent reduce the number of IP's, make the unit calls more costly, and to some extent exclude callers.[11]

c. *Voluntary Blocking*

Most importantly, the government presents no evidence to contradict the proposition that a properly implemented version of New York's current voluntary blocking system is adequately protective of children and is less restrictive than either a pre-subscription requirement or an independent billing mechanism.

i. Restrictiveness

In comparison with pre-subscription and independent billing, voluntary blocking enables a greater number of households to have access to IP's services and places fewer burdens on the IP's and listeners.

---

[10] IP's would not exist but for the antitrust break-up of AT & T and the consequent availability of telephone lines for commercial use.

[11] These conclusions are reached despite the fact that the government was able to substantiate that this suit is being financed not by the plaintiffs, but, in large part, by companies that engage in credit card billing.

The government contends that voluntary blocking is not necessarily a less restrictive means because it results in a greater burden on the parents who oppose access to IP's services than do other alternatives. However, the government's contention misconstrues the least restrictive means analysis which focuses on limiting the restrictions on the speakers and listeners of protected speech and not on the restrictions on those who wish to limit access to protected speech. Moreover, the Supreme Court and Circuit Courts have made clear that the responsibility for restricting access to protected speech because of an interest in protecting minors traditionally should be placed on the shoulders of parents in our society.[12] *See Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968); *Fabulous Associates, Inc.*, 896 F.2d at 788 (citing *Bolger v. Youngs Drug Products*, 463 U.S. 60, 73-74, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983) (parental discretion controlling access to unsolicited contraceptive advertisements in the home is the preferred method of dealing with such material)); *see also FCC v. Pacifica Foundation*, 438 U.S. 726, 758, 98 S.Ct. 3026, 3045, 57 L.Ed.2d 1073 (Powell, J., concurring); *cf. Carlin I*, 749 F.2d at 122 & n. 13 (voluntary blocking is "'analogous to a scheme used by the postal service whereby individuals may request material that they consider "to be erotically arousing or sexually provocative" not be delivered.'")(quoting FCC Report, 49 Fed. Reg. 24,998-99).

In other media of expression, the government's argument that the burden should be shifted away from the parents and on to the speakers would have more validity. In *Pacifica*, the Supreme Court held that when the means of communicating indecent speech allows an unexpected intrusion into the privacy of the home and is uniquely accessible to children, then indecent speech receives "limited protection" and the least restrictive means test is not applicable. 438 U.S. at 749-51, 98 S.Ct. at 3040-41. In *Sable*, the Supreme Court held that *Pacifica* does not govern regulation of indecent telephone communications because telephone speech "is not so invasive" as to constitute grounds for abandoning the least restrictive means test. 109 S.Ct. at 2837 (citing *Bolger v. Youngs Drug Products Corp., supra*, as governing rather than *Pacifica*). Accordingly, the Court finds that in the context of IP's utilizing the telephone lines to receive calls, there is a likelihood that the government will not be able to present sufficient evidence at trial to show that a voluntary blocking system, like that of New York, is not less restrictive than the means incorporated in the Helms Amendment.

---

[12] Whether this traditional approach to the protection of minors as a parental responsibility takes into account more recent changes of the parental role in today's society—such as the working mother, the single parent, and the children's rights movements—is beyond the scope of this Opinion, but is a problem which must be faced by the executive and legislative branches of government as well as by the judiciary.

ii. Effectiveness

The only remaining issue is whether voluntary blocking is an effective means of satisfying the government's compelling interest. The government relies on the testimony of Dr. Park Dietz, a member of the Attorney General's 1986 Pornography Commission and an expert on forensic psychiatry, as the basis for its contention that voluntary blocking is inadequate. However, Dr. Dietz only testified to the harm caused in three cases of children gaining access to sexually explicit telephone services. Such evidence is not broad enough a sample to constitute a valid social science study. Dr. Dietz also testified that he had read in a newspaper that Pacific Bell Company had received one hundred complaints in a month. Tr. 362. Even if that testimony is considered, the government has not provided the Court with that article, nor was it clear whether the article referred to complaints about the content of the telephone messages or about actual instances of exposure to the messages by children. Most importantly, it was not clear whether the 100 complaints in a month figure refers to the time period before or after Pacific Bell instituted a voluntary blocking scheme in the summer of 1988. Lastly, the weight which the Court gives Dr. Dietz's 100 complaint figure is somewhat diminished by testimony from Charles Eugene Ryan, Jr., the President of the Information Providers Association of California from 1987 through June 30, 1989, that voluntary blocking greatly reduced the number of complaints and that there were only 100 complaints annually rather than 100 complaints monthly before voluntary blocking went into effect. Tr. 289-93.

The evidence primarily relied upon by the government in support of its argument that voluntary blocking is ineffective is Dr. Dietz's testimony that exposure to certain sexually explicit messages can have an instantaneous negative psychological impact on a child. The government contends that under voluntary blocking, a parent will only protect his or her child when the parent has received a bill reflecting that the child has already obtained access and by that time the child will already have been damaged. Such testimony supports the Court's finding that the government has a compelling interest in protecting minors, but it does not show that more than "a few of the most enterprising and disobedient young people [can or are] manag[ing] to secure access to such [indecent telephone] messages," despite the presence of a voluntary blocking scheme. *Sable*, 109 S.Ct. at 2838.

Moreover, the evidence presented at the preliminary injunction hearing is that New York's voluntary blocking system did not show that minors were obtaining exposure to adult services without their parents' consent. Under New York's voluntary blocking system, the telephone bill itemizes all calls to IP's so parents can be on notice if children have utilized the telephone to contact a service. However, only 4 percent of New

York's 4.6 million households have requested voluntary blocking and no substantial evidence of complaints from parents about the exposure of their children was presented.

The New York Public Service Commission, after conducting hearings and preparing reports, has concluded on five occasions since 1988 that voluntary blocking was a sufficient restriction on IP's to protect minors. Although the Public Service Commission has received complaints, they primarily represent the expected adult opposition to the content of the IP's services and do not document exposure to children.[13]

Senator Helms, this statute's sponsor, stated on the floor of the Congress that, this legislation is necessary to stop "counting lives [from] being destroyed." *See* Cong.Rec. S15793 (daily ed. Nov.16, 1989). However, the Supreme Court obligates the Court not to defer to Congress but to make an independent judgment in this First Amendment context. *Sable*, 109 S.Ct. at 2838. The evidence before the Court shows that there is a likelihood that at trial the government will not be able to meet its "heavy burden of demonstrating," *Carlin I*, 749 F.2d. at 121, that a voluntary blocking system, as currently technologically available, is an ineffective means of protecting minors.[14] Accordingly, there is a likelihood that the Helms Amendment will be found to violate the First Amendment insofar as the means it utilizes to restrict speech are not the least restrictive means for effecting a compelling government interest.[15]

---

[13] In addition, James Favole, the owner of an IP which receives hundreds of thousands of New York calls per month, testified that he has informed the [New York] telephone company that "anytime there is a complaint, they [the telephone company] can address it to me." Tr. 56. But Mr. Favole has only received two complaints, Tr. 56.

[14] The Court notes that there appears to be room for improvement in the promotion of New York's voluntary blocking system to increase the public awareness of its availability.

B. *Vagueness*

[6] Turning from the statute's procedural mechanisms for accomplishing its goals to the meaning of the statute's substantive terminology, "[i]t is a basic principle that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). Plaintiffs contend that the use of the term "indecent" violates the vagueness doctrine's requirements that a statutory term not cause "men of common intelligence . . . necessarily [to] guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).[16]

The Supreme Court requires varying degrees of certainty in statutory terms. The Helms Amendment is subject to the most strict vagueness test because it imposes both civil penalties with a prohibitory effect and criminal penalties and because it reaches constitutionally protected speech. *See Village of*

---

[15] The least restrictive option is not necessarily constitutional if the burden it imposes on free speech outweighs the benefits to the government's compelling interest. *Carlin I*, 749 F.2d at 121. The Court does not reach the issue of whether voluntary blocking satisfies that balancing test.

In addition, the findings are subject to change in light of future economic and technological developments.

[16] The *Sable* Court upheld the power of Congress to regulate indecent telephone communications. 109 S.Ct. at 2836. The issue addressed herein is the separate issue of the meaning of indecent telephone speech, an issue not directly addressed by the *Sable* Court.

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193-94, 71 L.Ed.2d 362 (1982); *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). Although, the most stringent vagueness test does not "expect mathematical certainty from our language," *Grayned*, 408 U.S. at 110, 92 S.Ct. at 2300; the statute's terminology must be sufficient so that (1) plaintiffs have fair warning as to what conduct is prohibited, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972); (2) the law cannot be enforced arbitrarily or discriminatorily, *Grayned*, 408 U.S. at 108-09, 92 S.Ct. at 2298-99; and (3) speakers or IP's are not deterred from engaging in protected speech not subject to the Helms Amendment. *Id.* at 109, 92 S.Ct. at 2299.

The term "indecent" unto itself is highly ambiguous. A California court surveyed the history of the term in state courts and dictionaries, and produced an impressive array of adjectives and descriptions. *See In re Davis*, 242 Cal.App.2d 645, 51 Cal. Rptr. 702, 711-12 (1966) (citations omitted) (holding criminal statute void for vagueness); *see also State v. Kraft*, 214 La. 351, 37 So.2d 815, 817 (1948) (same).

However, courts can look beyond the dictionary definition of a statutory term for a definition. The most appropriate places for a specification of what Congress intended are the context in which the term appears in the code and in the FCC regulations. Although the regulations do not address this issue, the statutory context provides some help. Section 223(b)(1) restricts "obscene communication," so it is clear that in Section 223(b)(2) Congress intended "indecent" to mean something different than "obscene."

"Obscene" means that: (1) the average person, applying contemporary community standards, would find that the speech taken as a whole, appeals to the prurient interest; (2) measured by contemporary community standards, the speech depicts or describes, in a patently offensive way, ***sexual conduct specifically defined*** by the applicable state law; and (3) the speech, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). The *Miller* definition of obscenity has been upheld against vagueness challenges because it requires the incorporation of laws which "specifically define" the applicable expressive activity and thereby "provide fair notice to a dealer in such materials." 413 U.S. at 24, 27, 93 S.Ct. at 2614, 2616. The *Miller* Court also provided examples of specific definitions of proscribed conduct: "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of genitals." 413 U.S. at 25, 93 S.Ct. at 2615.

Then in *Hamling v. United States*, 418 U.S. 87, 114-16, 94 S.Ct. 2887, 2906-07, 41 L.Ed.2d 590 (1974), the Supreme Court "for the first time" held that the mere reference in a statute to an "obscene" "article, matter, thing, device or substance" is not vague because the term "obscene" had acquired a definition "limited to the sort of 'patently offensive representations or depictions of that specific "hard core" sexual conduct given as examples in *Miller v. California*.'" *Osborne*, — U.S. at — – —, 110 S.Ct. at 1169-1700. *See also Hamling*, 418 U.S. at 115, 94 S.Ct. at 2906 ("*United States v. 12,200-ft. Reels of Film*, [413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973),] made clear our willingness to construe federal statutes dealing with obscenity to be limited to material such as that described in *Miller*.") The same principle would require a court to deny a vagueness challenge to the term "obscene" in Section 223(b)(1) of the Helms Amendment. *See Sable*, 109 S.Ct. at 2835-36 (upholding constitutionality of Section 223(b)(1)'s regulation of obscene telephone speech) (citing *Hamling, supra*, and *United States v. 12,200-ft. Reels of Film, supra*).

However, this challenge is to the use of the term "indecent." In the past, courts have resolved challenges to the vagueness of the term "indecent" by construing it to mean "obscene." *See, e.g., Hamling, supra*; *Carlin III*, 837 F.2d at 558-60; *see also Osborne*, 110 S.Ct. at 1697 n. 7 (Brennan, J., dissenting) (reviewing cases in which "courts found it necessary to equate 'lewd' [and 'indecent'] with 'obscene' in order to avoid overbreadth and vagueness problems."); *Pacifica*, 438 U.S. at 740, 98 S.Ct. at 3035 (explaining Supreme Court's construction of term "indecent" to mean "obscene" in *Hamling, supra*; *United States v. 12,200-ft. Reels of Film*, 413 U.S. at 130 n. 7, 93 S.Ct. at 2670 n. 7; and *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 482-83, 82 S.Ct. 1432, 1434-35, 8 L.Ed.2d 639 (1962) (Opinion of Harlan, J.)). The implication of those holdings which construe "indecent" to mean "obscene" is that if the term "indecent" had not been susceptible to such a limiting construction then there would have been "constitutional problems." *Carlin III*, 837 F.2d at 558. The statute at issue here is not susceptible to such a limiting construction, because the Helms Amendment restricts "indecent communications" in a separate section than "obscene communications." *See* 47 U.S.C. §§ 223(b)(1) and 223(b)(2).

The government argues that even though "indecent" cannot be construed to mean "obscene," the term "indecent" is adequate under recent Supreme Court cases denying vagueness and overbreadth challenges to laws regulating speech which falls "short of obscenity." Gov.Post-Trial Mem. at 58. The statutes at issue in those cases, however, did not involve the mere use of the term "indecent."

In *New York v. Ferber*, there was an overbreadth challenge to the statutory terms "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.'" 458 U.S. 747, 765, 773-74, 102 S.Ct. 3348, 3358, 3363-64, 73 L.Ed.2d 1113 (1982). Those terms all contain a "precision," *id.* at 765, 102 S.Ct. at 3358, which the term "indecent" lacks. Indeed, the Supreme Court noted that the statutory terms were of "sufficient precision" to be one of the examples of sexual conduct which the *Miller* Court had denominated obscene. 458 U.S. at 765, 102 S.Ct. at 3358 (citing *Miller*, 413 U.S. at 25, 93 S.Ct. at 2615). *See supra* (quoting the examples of "sexual conduct specifically defined by" law incorporated within the *Miller* definition of obscenity, 413 U.S. at 25, 93 S.Ct. at 2615).

Similarly, in *Osborne, supra*, the Supreme Court deferred to a state court's construction of a state law, slip op. at 15, and held that the terminology of the state's prohibition on expression, as set forth by the state court, was sufficiently exact to withstand constitutional scrutiny. The state court terminology was: "'the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.'" *Osborne*, — U.S. at —, 110 S.Ct. at 1697 (quoting Ohio Supreme Court).[17]

The government also relies on the denial of a vagueness challenge in *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). The statute in *Young* defined the terms "specified sexual activities" and "specified anatomical areas" with an extensive list. 427 U.S. at 53 n. 4, 96 S.Ct. at 2444 n. 4. Moreover, the *Young* Court did not consider the validity of the plaintiffs' vagueness claims because there was no issue as to whether the statute applied to the expressive activity of the plaintiffs. *Id.* at 58-59, 96 S.Ct. at 2446-2447.

---

[17] The statutory language in *Osborne* was also significantly more precise than here: "'minor in a state of nudity.'" — U.S. at —, 110 S.Ct. at 1694.

Here, plaintiffs actively question whether the term "indecent" encompasses any of their speech and, if it does, plaintiffs question which characteristics of their speech are determinative of whether or not the speech falls within the scope of the term "indecent." There was testimony that the speech of IP's comes in live and taped formats, and the contents include verbal re-creations of masturbation, male and female homoeroticism, "the erotic application of an enema," simulated rape, anal intercourse, sadomasochism, anilingus, group sex, vaginal intercourse, fellatio, sucking and biting, passive and aggressive responses, as well as digital, phallic and foreign object penetration.[18] Gov.Ex.T.

The word "indecent" in the Helms Amendment will satisfy the due process goals of the vagueness doctrine, *see supra*, if it is possible to find an inherent and specific meaning to the term "indecent communications for commercial purposes" "by means of telephone," as it was possible to find an inherent and specific meaning for the term "obscene" in *Hamling v. United*

---

[18] The verbal depictions of these acts may well constitute obscenity under *Miller*.

The government's position at trial and the FCC's position in its Report and Order is that health-related discussions of AIDS are not considered to be indecent.

The government's position at trial was that live commercial telephone communications, for example the gay oriented lines in existence on New York's 550 prefix, would not be subject to the statute's restrictions because the speech would not be "communications for commercial purposes." However, the FCC states in its Report and Order that the statute does cover live commercial conversations.

States, supra. In *Hamling*, the Supreme Court held that the term "obscene" was not vague because the *Miller* decision had "enumerat[ed) specific categories of material" as obscene. 418 U.S. at 116, 94 S.Ct. at 2907. The government argues that *Pacifica, supra*, similarly set forth a precise definition of "indecent" which must be utilized in this statute. *See also* Report and Order at 6, ¶ 12 (assuming that *Pacifica* definition of "indecent " is what courts will find "indecent" to mean in Helms Amendment).

In *Pacifica*, the Supreme Court, in a 5-4 decision, reviewed whether the definition of "indecent" set forth by the FCC, with regard to the regulation of radio broadcasts, was impermissibly vague or overbroad. In the FCC opinion under review, the FCC had determined that in the specific factual context at issue, "indecent" meant:

> 'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.'

438 U.S. at 732, 98 S.Ct. at 3031 (quoting 56 F.C.C. 94, 98 (Feb. 21, 1975)). Justice Stevens, wrote for the Court that even though "indecent" on its own "merely refers to nonconformance with accepted standards of morality," 438 U.S. at 740, 98 S.Ct. at 3035, the FCC definition was constitutionally adequate because it "will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities." 438 U.S. at 743, 98 S.Ct. at 3037. *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) [hereinafter *Act*] ("if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction").

Although the *Pacifica* definition of "indecency" has been referred to as "a generic definition of indecency," *see ACT*, 852 F.2d at 1337, courts and the FCC have repeatedly emphasized that the applicability of the FCC's generic *Pacifica* definition of "indecent" is limited to a specific radio broadcasting context. The Supreme Court made clear the narrowness of its holding by stating that the *Pacifica* definition of "indecency" was not necessarily applicable to "a two-way radio conversation." *Pacifica*, 438 U.S. at 750, 98 S.Ct. at 3041; television and "closed circuit transmissions," *Ibid.*; or mail. *Bolger*, 463 U.S. at 74, 103 S.Ct. at 2884. The FCC also declined even to expand the definition into the realms of news and public affairs programming. *ACT*, 852 F.2d at 1337. In 1987, the FCC finally expanded the *Pacifica* definition of indecency to cover all radio broadcasts, but that was only after "a Public Notice alerting all broadcasters to the new, generic standard by which broadcasts would be judged." *ACT*, 852 F.2d at 1337 (citing *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 64 Rad.Reg.2d (P & F) 1218, 1218-19 (1987)).[19]

The reasoning behind the "narrowness," 438 U.S. at 750, 98 S.Ct. at 3041, of the applicability of *Pacifica's* definition of "indecency" is the nature of indecency. The *Pacifica* Court explained that indecency is derived from the concept of nuisance, "'a right thing in the wrong place—like a pig in the parlor instead of a barnyard.'" 438 U.S. at 750, 98 S.Ct. at 3041 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct., 114, 118, 71 L.Ed. 303 (1926)). In this respect, indecency is different than obscenity, which does not lose its character depending on the context or medium of expression used. Each different parlor creates different "indecent" pigs or, as Justice Stevens wrote for the *Pacifica* Court, "each medium of expression presents special First Amendment problems. ... The reasons for these distinctions are complex." 438 U.S. at 748, 98 S.Ct. at 3039-40. Consequently, "indecency is largely a function of context—it cannot be adequately judged in the abstract." 438 U.S. at 742, 98 S.Ct. at 3037.

---

[19] Although the word "Television" appears in the name of the lead plaintiff in the *ACT* case, the case was only about the regulation of radio broadcasting and made no reference to the extension of the *Pacifica* generic definition of "indecent" outside the realm of radio broadcasting. The *ACT* decision followed *Pacifica* and upheld *Pacifica's* "radio broadcasting" definition of "indecent" against a vagueness challenge. 852 F.2d at 1338-39.

Here, the government asks the court to assume that the *Pacifica* definition is to be carried over into the realm of telephone communication, despite the absence of any rule, regulation or statutory language indicating that the *Pacifica* definition has somehow been incorporated into the Helms Amendment. Precedent directs against the government's proposed transplant of the *Pacifica* definition. In *Sable*, the Supreme Court held that *Miller* standards governed, the obscenity portion of the statutory regulation of telephone communications, 109 S.Ct. at 2835-36 (citing *Hamling, supra*, and *United States v. 12,200-ft. Reels of Film, supra*); but that *Pacifica* was not applicable to the indecency portion of the telephone communications statute. Justice White, writing for the *Sable* Court, held *Pacifica* to be "readily distinguishable" because the radio medium in *Pacifica* was "manifestly different from" the medium of telephone communications. 109 S.Ct. at 2837. The "uniquely pervasive" character of the radio broadcasting medium in *Pacifica* created a "captive audience" context from which "indecency" emerged in *Pacifica* under a nuisance theory. *See Sable*, 109 S.Ct. at 2837; *Pacifica*, 438 U.S. at 748-50, 98 S.Ct. at 3039-40. The telephone medium at issue here has been held by the Supreme Court to be "substantially different" than the *Pacifica* radio medium, because the telephone medium lacks radio broadcasting's "invasive" and "captive audience" characteristics. *Sable*, 109

S.Ct. at 2837; *Carlin III*, 837 F.2d at 560 ("telephone calls made by an individual over a private line differ significantly from the public broadcast in *Pacifica*"). It is not even clear if it is possible for *Pacifica*-type "indecency" to emerge from a medium of communication, such as the telephone, which lacks the intrusive "captive audience" characteristic that formed the basis for the existence of the nuisance of indecency in the medium in *Pacifica*. *See Cruz v. Ferre*, 755 F.2d 1415 (11th Cir.1985) (striking down regulation of indecent content of cable television broadcasts because of differences between cable television medium and radio broadcasting in *Pacifica*); *Community Television v. Wilkinson*, 611 F.Supp. 1099 (D.C.Utah 1985) (same), aff'd sub nom., *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir.1986), aff'd, 480 U.S. 926, 107 S.Ct. 1559, 94 L.Ed.2d 753 (1987). In light of the differences between media of communication, the Court finds that it cannot be assumed that the *Pacifica* definition of "indecent" applies here.[20]

Without any additional specificity, the term "indecency" on its own is too vague to pass constitutional muster. The term indecency does not inherently contain within it a reference to specifically defined conduct, as does the term "obscenity." *See Hamling, supra.* Moreover, the term does not appear in the context of a specific definition of conduct, as was the case with the terms in *Pacifica, supra*; *Ferber, supra*; and *Osborne, supra*. The statute and regulations only make a person of common intelligence aware that "offensive" communications are to be restricted. There must be notice of what constitutes such indecency or offensiveness, or else: there is not fair notice of what is restricted; the statute can be arbitrarily enforced; and protected expression could be deterred. Accordingly, based on the record currently before this Court, there is likelihood that plaintiffs will be able to prove that Section 223(b)(2) is void for vagueness.

---

[20] In addition, the Helms Amendment imposes criminal penalties, while only the threat of a civil sanction was at stake in *Pacifica*.

C. *Prior Restraint*

[7] The dangers to First Amendment freedoms presented by vagueness are compounded if the statute also operates by means of an unconstitutional prior restraint. *Interstate Circuit v. City of Dallas*, 390 U.S. 676, 682, 88 S.Ct. 1298, 1302, 20 L.Ed.2d 225 (1968). Constitutional principles of free speech and due process prohibit the government from placing prior restraints on protected speech without appropriate procedural safeguards. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). The threshold issue is whether the statute is structured so as to create a prior restraint. A brief review of the planned operation of the Helms Amendment is necessary to resolve that issue.

[8] Section 223(c)(1) requires common carriers to categorize, as either indecent or decent, the content of speech made by IP's that use a carrier's billing systems.[21] Accordingly, Section 223(c)(1)'s mandate that the carrier "shall not, to the extent technologically feasible provide access" to the IP's "indecent" telephone services will be applicable to all IP's currently using the carrier's billing system, unless the IP switches to an independent billing system or complies with a system of pre-subscription. The carrier may, however, continue to bill, as at present, for "decent" IP services. The effect of Section 223(c)(1) is that carriers will have to evaluate the

---

[21] The evidence is that the vast majority of IP's in operation currently use carrier billing. In New York, independent billing has only been an option available to IP's since May 1990.

speech of the IP and require IP's utilizing indecent speech to utilize pre-subscription or an independent billing mechanism.[22]

The government argues that a carrier's classification and imposition of such conditions to carrying telephone communications is not a prior restraint but a subsequent punishment. However, Section 223(c)(1)'s requirement that a carrier prevent access to an indecent communication calls for the carriers to impose restrictions on an IP's communication *before* that communication has been expressed. By contrast, Section 223(b)(2)'s subjection of IP's and carriers to penalties for the communication of indecent speech is a punishment

---

[22] Section 223(c)(2)(A) further promotes the active role of the carrier in classifying and imposing pre-conditions on IP's "indecent" telephone speech by granting the carrier "good faith" immunity from any cause of action brought against the carrier in response to the carrier's having "restrict[ed] access" to speech it had pre-determined to be "indecent."

The sole exception to Section 223(c)(2)(A) is an IP's declaratory judgment action "limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only to subscribers who have previously requested such access." 47 U.S.C. § 223(c)(3).

The statute also provides a carrier with immunity for *failing* to restrict indecent speech, *see* 47 U.S.C. § 223(c)(2)(B); however, this immunity is sufficient to relieve the carrier from its role of actively classifying and imposing pre-conditions on the communication of indecent telephone speech. Section 223(c)(2)(B) immunity is premised on "good faith" reliance on an IP's representation that its communications are not indecent. A carrier can be put on notice, through a petition or complaint, that the IP's representation of a lack of indecency is incorrect. After such notice, the carrier will be obligated to undertake an independent examination before it can allow unrestricted access to future communications of the IP based on a "good faith" belief in the correctness of the IP's representation of a lack of indecency.

subsequent to the expression of the indecent speech.[23] Section 223(c)(1) makes no reference to speech already communicated. The sole function of Section 223(c)(1) is to have certain conditions placed on speech that is to be communicated in the future and to have those conditions put in place before that speech is communicated. Accordingly, Section 223(c)(1) requires action "prior" to communication.

The prior action of the carriers also constitutes a "restraint" on protected speech. The effect of Section 223(c)(1)'s requirement, that a carrier make a determination that an IP's speech is indecent and impose a system of pre-subscription or independent billing, is to restrict the future communication of that speech. A restriction on speech need not effect a ban on that speech to constitute a prior restraint. *See Southeastern*, 420 U.S. at 556-57 & n. 8, 95 S.Ct. at 1245 & n. 8 (denial, based on content of play, of use of municipal auditorium was a prior restraint "even if a privately owned forum had been available") (citing *Schneider v. State*, 308 U.S. 147, 163, 60 S.Ct. 146, 151-52, 84 L.Ed. 155 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place")); *Interstate Circuit v. Dallas, supra* (prior restraint results from government authorized board which classified film as "not suitable for young persons," even though film is not banned by that classification); *Grosjean v. American Press Co.*, 297 U.S. 233, 244-45, 56 S.Ct. 444, 447, 80 L.Ed. 660 (1936) (statute imposing tax on newspapers with high circulation is a prior restraint because "its direct tendency is to restrict circulation").

---

[23] The FCC actions upheld in *Pacifica, supra*, and the obscenity statute upheld in *Sable, supra*, involved post-dissemination penalties. In *Pacifica*, the FCC had threatened to penalize the plaintiff for speech that had already been broadcast; and in *Sable*, the statute called for penalties for those who knowingly had made obscene telephone communications in the past.

The government argues, however, that any prior restrictions imposed on speech by the carriers cannot be unconstitutional because the prior restraints are the product of a private determination, rather than government action. It is undisputed that common carriers are private entities and that there is no constitutional problem raised by a common carrier independently deciding that it would rather not facilitate the communication of indecent speech. *See Sable*, 109 S.Ct. at 2840 (Scalia, J., concurring); *Mountain States Telephone and Telegraph Company*, 827 F.2d 1291, 1295 (9th cir.1987) [hereinafter *Mountain States*] (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-54, 95 S.Ct. 449, 453-55, 42 L.Ed.2d 477 (1974) (public utilities are not state actors)), cert. denied, 485 U.S. 1029, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); *Carlin Communications, Inc. v. Southern Bell Telephone and Telegraph Co.*, 802 F.2d 1352, 1357 (11th Cir.1986) [hereinafter *Southern Bell*] (same). The issue is whether the statute sets up a structure so that the acts of a common carrier in restricting indecent speech by IP's will be "fairly attributable to" the federal government. *Cf. Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982) (defining "state action").

At least in New York State, the decision of a carrier to impose restrictions required by the Helms Amendment will be attributable to the federal statutory scheme and not an independent decision. New York Public Service Commission Rule 605.2(b) states:

> No telephone corporation operating as a common carrier shall unreasonably restrict lawful network. No restriction may impede access between a content service provider and a willing customer, except where required by law. All restrictions shall be administered in a least restrictive fashion.

> 1. Requirements by telephone corporations on users for prior subscription to a particular content services will generally be permissible only where requested by the provider of the service, or required by law, or where a waiver is granted.
>
> 2. End-user initiated blocking shall always be available for content services, to the extent technically and economically feasible.

In effect, the New York Public Service Commission rules prohibit a telephone carrier in New York from imposing a system of pre-subscription or independent billing, unless the government acts by passing a law requiring such restrictions. *See* Taratus Aff. at ¶ 22. Accordingly, any decision by a carrier in New York to restrict indecent telephone speech through imposing pre-subscription or independent billing will be the products of the Helms Amendment and therefore are attributable to that statute and not private action. *Compare Peterson v. City of Greenville*, 373 U.S. 244, 248, 83 S.Ct. 1119, 1121, 10 L.Ed.2d 323 (1963) (restauranteur's racial segregation of his restaurant in city where there is an ordinance requiring segregation of customers is state action "even assuming, as respondent contends, that the manager would have acted as he did independently of the existence of the ordinance"), *and Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67-70, 83 S.Ct. 631, 637-39, 9 L.Ed.2d 584 (1963) (book distributor's decision not to sell those books which a state commission had classified as "objectionable" was a product of state action, even though distributor was "'free' to ignore the Commission's notices, in the sense that his refusal to 'cooperate' would have violated no law," because "[t]he Commission's operation is a form of effective state regulation"), *with Mountain States*, 827 F.2d at 1297 (carrier's ban on IP's sexually explicit speech was a product of independent business judgment because carrier was "free" to extend service to IP and "immunize[d] from state pressure" to restrict IP's access), *and Southern Bell*, 802 F.2d at 1361 ("only reasonable inference that can be drawn from the record in this case is that the operative decisions [to restrict access to an IP] ... were made by Southern Bell [the carrier]").

[9] The finding that the statute creates a system of prior restraint does not render the statute unconstitutional *per se*; however, that finding does create "'a heavy presumption against its [the statute's] constitutional validity.'" *FW/PBS, Inc. v. City of Dallas*, —U.S.—, 110 S.Ct. 596, 604, 107 L.Ed.2d 603 (1990) (quoting *Southeastern Promotions, Ltd.*, 420 U.S. at 558, 95 S.Ct. at 1246). The Supreme Court has set forth "rigorous procedural safeguards" which must be satisfied for a prior restraint to withstand constitutional scrutiny.[24] *Southeastern Promotions, Ltd.*, 420 U.S. at 561, 95 S.Ct. at 1248. The purpose of these safeguards is to protect against the "danger that he [the party restraining speech prior to its expression] may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." *Freeman v. Maryland*, 380 U.S. 51, 57-58, 85 S.Ct. 734, 738, 13 L.Ed.2d 649 (1965).

[10] The three procedural safeguards which the Supreme Court has held to be necessary to guard against a prior restraint are:

(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo

---

[24] The government does not argue here that indecent telephone communication is one of the established exceptions to the doctrine of prior restraint. *See Southeastern Promotions, Ltd.*, 420 U.S. at 555-56, 95 S.Ct. at 1244-45 (listing exceptions, such as when there is a "captive audience" problem). Since this is a content-based restriction of speech, the exception for "time, place, and manner" regulations does not apply here either. *See FW/PBS, Inc.*, 110 S.Ct. at 614-15 (White, J., dissenting); *Southeastern Promotions, Inc.*, 420 U.S. at 555, 95 S.Ct. at 1244.

> must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

FW/PBS, Inc., 110 S.Ct. at 606 (citing *Freedman*, 380 U.S. at 58-60, 85 S.Ct. at 738-39). The statute fails to provide any of, what have come to be known as, the three *Freedman* safeguards.

The first *Freedman* safeguard is intended to limit the effect of the restraints imposed as a result of a carrier's determination through the specification of a limit on the length of time for which a carrier's determination can be in effect prior to judicial review. The first safeguard is not present, because the statute does not limit the time period prior to judicial review during which the carrier's determination, that communications will be indecent, will be in effect.

The second and third safeguards are not satisfied here, because the only provision for judicial review of the carrier's determination is Section 223(c)(3). That Section provides neither for expedited judicial review, for the carrier to bear the burden of going to court, nor for the carrier to bear the burden of proof at trial. Section 223(c)(3) only provides for the IP to bring a declaratory judgment action.

The right to bring a declaratory judgment action is essentially the same as the right of the theatrical promoter in *Southeastern* to bring an action seeking an injunction against the municipal auditorium's imposition of restrictions on his play on the grounds that the municipal auditorium had incorrectly characterized his play's content as obscene. In *Southeastern*, the Supreme Court pointed out that a final determination on the merits of whether the play was obscene took a few months, 420 U.S. at 562, 95 S.Ct. at 1248, which was not a sufficiently expeditious period because the dates on which the promoter had planned to present his play without any restraints had passed by the time the court's final determination was made. *Ibid.* Since there was evidence that IP's change their pre-recorded messages frequently, the Section 223(c)(3) declaratory judgment action is not expeditious judicial review. It appears likely that an IP would be forced to subject its speech to the restrictions of pre-subscription or independent billing before that IP would receive a final determination on the merits of a declaratory judgment action under Section 223(c)(3). In addition, Section 223(c)(3) on its face fails to meet the requirement that the carrier bear the burden of going to court and of proving that the basis for the restraint is a correct classification of indecency.[25]

Section 223(c) of the Helms Amendment does not incorporate safeguards required by the Supreme Court to obviate the dangers inherent in a system of prior restraint of protected speech. Accordingly, there is a likelihood that plaintiffs will prevail on their claim that the Helms Amendment contains an unconstitutional prior restraint.

---

[25] In *FW/PBS, Inc.*, three Justices of the Supreme Court held that the third *Freedman* safeguard—that the censor bear the burden of going to court and bear the burden of proof once in court—need not be met in that case for the following reasons: (1) because the censor in that case only made a "ministerial" determination on whether or not to grant a license and did not make an explicit judgment based on the content of any protected speech, and (2) because the licensing applicants had their entire livelihoods at stake so they would undoubtedly undertake the burden of going to court to challenge the decision to impose the restrain. 110 S.Ct. at 607 (Opinion of O'Connor, J.). Those justifications for not requiring that the third safeguard be satisfied are not present here. The statute requires the carriers to pass judgment directly on the content of protected speech. Moreover, there is evidence that many IP's can survive profitably, despite a classification of indecent by the carrier, by subjecting themselves to the pre-conditions of Section 223(c)(1).

Conclusion

There is a likelihood that plaintiffs will succeed on the merits of their claims that the Helms Amendment (1) violates the First Amendment by failing to employ the least restrictive means to effect a compelling government interest, (2) violates the First and Fifth Amendments under the void for vagueness doctrine, and (3) violates the First and Fifth Amendments by containing a prior restraint unaccompanied by adequate procedural safeguards. Thus the enforcement of the Helms Amendment presents a threat of imminent irreparable harm to First Amendment freedoms. Plaintiffs' motion for a preliminary injunction if granted.

Plaintiffs are to submit a preliminary injunction for signature by the Court on five days notice to the defendant. Counsel are to appear at a conference at 9:00 A.M. on August 29, 1990.

IT IS SO ORDERED.

ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NUMBER
90 Civ. 6289

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 3rd day of Sept., one thousand nine hundred and ninety one.

DIAL INFORMATION SERVICES CORP. of NEW YORK;
FABULOUS ASSOCIATES, INC,; SOURCE COMMUNICATIONS, INC.;
and TELE-PRO COMMUNICATIONS CORP.,

Plaintiffs,

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL
of the UNITED STATES,

Defendant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellees Dial Information Services Corp. of NY, Fabulous Associates Inc., Source Communications Inc. and Tele-Pro Communications Corp.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NUMBER
90 Civ. 6289

MANDATE

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 15th day of July, one thousand nine hundred and ninety-one.

Present: HON. WILFRED FEINBERG,
HON. ROGER. MINER,
HON. J. DANIEL MAHONEY,
Circuit Judges.

DIAL INFORMATION SERVICES CORP. of NEW YORK; FABULOUS ASSOCIATES, INC,; SOURCE COMMUNICATIONS, INC.; and TELE-PRO COMMUNICATIONS CORP.,

Plaintiffs,

v.

RICHARD L. THORNBURGH, ATTORNEY GENERAL of the UNITED STATES,

Defendant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from the judgement of said district court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

ELAINE B. GOLDSMITH,
Clerk

Edward J. Guardaro,
Deputy Clerk

BEST AVAILABLE COPY

90 Civ 1719 SDNY Patterson CJ CK

DOC # 33

****
* RECORDS COPY *
* PLEASE RETURN TO ROOM *
* 1702 *
****
****

United States Court of Appeals
FOR THE SECOND CIRCUIT

PAGE 1

Each motion must be accompanied by a supporting affidavit.

DIAL INFORMATION SERVICES CORPORATION OF NEW YORK Et Al.,

vs.

RICHARD L. THORNBURGH, Attorney General of the United States,

OCT 1991

90-6289
Docket Number

NOTICE OF MOTION

state type of motion

for Recall of Mandate and Stay Pending Petition for Writ of Certiorari

UNITED STATES COURT OF APPEALS
FILED
SEP 19 1991
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

ROGER H. BRITON
Seham, Klein & Zelman
485 Madison Avenue, New York, New York 10022
(212) 935-6020

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Otto Obemair, United States Attorney
Attn: Edward Ferguson
100 Church Street, 19th Fl.
New York, New York 10007
(212) 385-6321

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date: September 23, 1991
(See Second Circuit Rule 27(b))

Has argument date of appeal been set: Not applicable/recall of mandate

A. by scheduling order? ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date:

Judge or agency whose order is being appealed:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☒ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not: Recall of Mandate

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Not applicable

Brief statement of the relief requested: Plaintiffs-Appellees seek immediate hearing on motion for recall of Mandate since they were not aware of denial of petition for rehearing until after Mandate was issued. Plaintiffs-Appellees also seek stay of issuance of second Mandate pending petition for writ of certiorari to U.S. Supreme Court.

Complete Page 2 of This Form

By: *(Signature of attorney)*

Roger H. Briton

Signed name must be printed beneath

ROGER H. BRITON

Appearing for: *(Name of party)*
DIAL INFORMATION SERVICES CORPORATION OF NEW YORK

9/19/91
Date

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant

Appellee or Respondent:
☒ Plaintiff ☐ Defendant

UNITED STATES COURT OF APPEALS
FILED
SEP 27 1991
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted ~~denied~~ to the extent that the mandate is recalled, and the issuance of a new mandate is stayed for thirty days. No further stay will be granted.

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk

By ....
Deputy Clerk

Sept. 27, 1991
Date

Wilfred Feinberg

Roger J. Miner

Circuit Judge

Rules Adopted by the Federal Communications Commission Implementing the Helms Amendment

64.201 Restrictions on Indecent Telephone Message Services.

(1) It is a defense to prosecution for the provision of indecent communications under Section 223(b)(2) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. 223(b)(2), that the defendant has taken the action set forth in (a) below and, in addition, has complied with the following: Taken one of the actions set forth in subsections (b), (c), or (d) herein to restrict access to prohibited communications to persons eighteen years of age or older, and has additionally complied with subsection (e), where applicable:

(a) Has notified the common carrier identified in Section 223(c)(1) of the Act, in writing, that he or she is providing the kind of service described in Section 223(b)(2) of the Act.

(b) Requires payment by credit card before transmission of the message; or

(c) Requires an authorized access or identification code before transmission of the message, and where the defendant has:

(1) Issued the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age; and

(2) established a procedure to cancel immediately the code of any person upon written, telephonic or other notice to the defendant's business office that such code

has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired; or

(d) Scrambles the message using any technique that renders the audio unintelligible and incomprehensible to the calling party unless that party uses a descrambler; and,

(e) Where the defendant is a message sponsor subscriber to mass announcement services tariffed at this Commission and such defendant prior to the transmission of the message has requested in writing to the carrier providing the public announcement service that calls to this message service be subject to billing notification as an adult telephone message service.

(2) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication described in Section 223(b) of the Act from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

Supreme Court, U.S.
FILED
DEC 30 1991
OFFICE OF THE CLERK

(2)

No. 91-697

In the Supreme Court of the United States

OCTOBER TERM, 1991

DIAL INFORMATION SERVICES CORPORATION
OF NEW YORK, ET AL., PETITIONERS

v.

WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether 47 U.S.C. 223(b) and (c) (Supp. I 1989), which restrict the manner in which indecent commercial telephone communications may be made available to the public, are unconstitutional on their face under the First Amendment.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 5
Fabulous Associates, Inc. v. *Pennsylvania Public Utility Comm'n*, 896 F.2d 780 (3d Cir. 1990) 7
FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) 5, 11
Fort Wayne Books, Inc. v. *Indiana*, 489 U.S. 46 (1989) ....
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 10
Information Providers' Coalition for Defense of the First Amendment v. *FCC*, 928 F.2d 866 (9th Cir. 1991) 3, 10, 11, 12, 13
Kolender v. *Lawson*, 461 U.S. 352 (1983) 10
Peak v. *United States*, 353 U.S. 43 (1957) ....
Regulations Concerning Indecent Communications by Telephone, 5 F.C.C. Rcd 4926 (1990) 5, 10, 13
Sable Communications of California, Inc. v. *FCC*, 492 U.S. 115 (1989) 2, 8, 11, 12

Constitution and statutes:

28 U.S.C. 2342(1) 3
47 U.S.C. 223 (Supp. I 1989) 2, 7, 8, 9
§ 223(b), 47 U.S.C. 223(b) (Supp. I 1989) 3, 4, 6
§ 223(b) (2) (A), 47 U.S.C. 223(b) (2) (A) (Supp. I 1989) 2
§ 223(b) (3), 47 U.S.C. 223(b) (3) (Supp. I 1989) 2, 3
§ 223(c), 47 U.S.C. 223(c) (Supp. I 1989) 2, 3, 4, 6, 13
§ 223(c) (1), 47 U.S.C. 223(c) (1) (Supp. I 1989) 3, 13
§ 223(c) (2) (B), 47 U.S.C. 223(c) (2) (B) (Supp. I 1989) 13

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-697

DIAL INFORMATION SERVICES CORPORATION
OF NEW YORK, ET AL., PETITIONERS

v.

WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 938 F.2d 1535. The opinion of the district court (Pet. App. 24a-64a) is reported at 742 F. Supp. 1255.

JURISDICTION

The judgment of the court of appeals (Pet. App. 67a-68a) was entered on July 15, 1991. A petition for rehearing was denied on September 3, 1991 (Pet. App. 65a-66a). The petition for a writ of certiorari was filed on October 28, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 126-131 (1989), this Court invalidated a categorical statutory prohibition on indecent commercial telephone messages, commonly known as "dial-a-porn." The Court explained that the statute had not been shown to be "a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages." *Id.* at 131.

Congress responded by enacting 47 U.S.C. 223(b) and (c) (Supp. I 1989), a statute that permits distribution of dial-a-porn to adults but mandates procedures calculated to deny access to children.[1] Section 223(b)(2)(A) prohibits the transmission over the telephone of "any indecent communication for commercial purposes," where the communication is "available to any person under 18 years of age or to any other person without that person's consent." Section 223(b)(3) recognizes a defense, however, for those providers who "restrict access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the [Federal Communications] Commission may prescribe by regulation."

In pertinent part, subsection (c) states that a common carrier that "collects from subscribers an identifiable charge" for indecent communications "that the carrier remits, in whole or in part, to the provider of such communication" shall not provide access to such communication "from the telephone of any subscriber who has not previously requested" such access

---

[1] All citations to this statute in the remainder of this brief are to the 1989 Supplement to the United States Code.

"in writing." 47 U.S.C. 223(c)(1). To comply with this "presubscription requirement," a telephone company must either refrain from furnishing billing services to dial-a-porn providers, effectively requiring the providers to employ other means of collecting fees for their messages, or limit access to indecent communications to those persons who have previously made a written request for access.

The Federal Communications Commission has promulgated regulations (Pet. App. 71a-72a) that also specify requirements for the safe harbor provided by 47 U.S.C. 223(b)(3). Under the FCC regulations, a dial-a-porn provider must (1) notify the telephone company in writing that the provider's messages include indecent material, and (2) require payment by credit card, employ access or identification codes, or scramble its messages. *Ibid.* In *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866 (1991) [hereinafter *Information Providers*], the Ninth Circuit upheld the statute and implementing regulations against constitutional challenges substantially identical to those advanced in this case. (The regulations are not at issue in this case, since this case was commenced in the district court, and the courts of appeals have exclusive jurisdiction to determine the validity of FCC regulations. 28 U.S.C. 2342(1); see Pet. App. 28a.)

2. Petitioners are companies that provide commercial telephone messages having, "exclusively or in part, a sexually explicit content" (Pet. App. 24a). They allege that Sections 223(b) and (c) are unconstitutional on their face with respect to nonobscene, but indecent, telephone communications. On petitioners' motion, the district court granted a preliminary injunction against enforcement of the statute. Pet. App. 22a-23a.

The district court acknowledged that the statute's declared purpose—the protection of "the psychological well-being of minors"—is "a compelling interest" that "justifies a restriction on indecent speech." Pet. App. 34a. The court ruled, however, that there was a likelihood that petitioners would prevail on their contention that Section 223(c)'s presubscription requirement is not the "least restrictive means" of advancing that interest. Pet. App. 45a-46a. The court found no evidence "to contradict the proposition" that "voluntary blocking"—a procedure by which a subscriber may request the telephone company to block all calls from his telephone to telephone prefixes reserved for indecent telephone messages—"is adequately protective of children and is less restrictive than either a presubscription requirement or an independent billing mechanism." *Id.* at 41a.

The court also ruled that petitioners were likely to prevail on their contentions that Section 223(b)'s prohibition on "indecent" communications is "too vague to pass constitutional muster" (Pet. App. 55a), and that the statute's presubscription requirement is an unconstitutional "prior restraint" (*id.* at 63a). With respect to the latter ground, the court reasoned that Section 223(c) obligates telephone companies to "evaluate the speech" of information providers seeking access to the companies' billing services and to require those providers "utilizing indecent speech to utilize pre-subscription or an independent billing mechanism." Pet. App. 57a. Thus, the court concluded, the statute involves action "prior" to indecent telephone communications and operates as a "restraint" on those communications. *Id.* at 58a.

3. The court of appeals reversed. Pet. App. 1a-21a. The court first held that the statute, as con-

strued by the FCC, "is sufficiently defined to provide guidance to 'the person of ordinary intelligence' in the conduct of his affairs." *Id.* at 14a. The court noted that the FCC interpreted the statute in the course of notice-and-comment rulemaking to encompass "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." *Id.* at 13a (quoting In re *Regulations Concerning Indecent Communications by Telephone*, 5 F.C.C. Rcd 4926, 4927 ¶ 12 (June 29, 1990) [hereinafter *Report and Order*]). Relying on *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court found that the Commission's definition was entitled to deference. The court also relied on this Court's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 731-732 (1978), which sustained a substantially identical definition of indecent material in the context of broadcasting. Pet. App. 13a.

The court of appeals also reversed the district court's determination that voluntary blocking would be an effective, but less restrictive, means of protecting children from indecent telephone communications. The court concluded that "voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn billed by the telephone company as would the presubscription requirement of [47 U.S.C. 223(c)]." Pet. App. 15a. In support of that determination, the court noted that although blocking had been available for over two years in the New York area, "only four percent of the 4.6 million residential telephone lines in the area * * * have been blocked." *Ibid.* According to one study, the court continued, "half of the residential households in

New York are not aware of either the availability of dial-a-porn or of blocking." *Id.* at 16a.

Citing evidence that children may suffer "serious psychological damage" before their parents become aware from a telephone bill that they have been exposed to dial-a-porn, the court also observed that "[c]ommon sense dictates that a presubscription requirement * * * is more likely" to prevent access to dial-a-porn by children "than blocking after one or more occasions of access." Pet. App. 16a. "It always is more effective," the court stated, "to lock the barn *before* the horse is stolen." *Ibid.* (emphasis in original). The court of appeals held, accordingly, that "[t]o the extent that the district court found that voluntary blocking was not ineffective" in preventing access to indecent messages by children, "its finding was clearly erroneous." *Id.* at 17a.

Finally, the appeals court held that 47 U.S.C. 223(b) and (c) do not impose an unconstitutional prior restraint on indecent telephone messages. The court explained that the statute does not involve any effort by the *government* to approve or enjoin speech in advance, since, as construed by the FCC, it "requires no one except dial-a-porn providers to classify their messages." Pet. App. 20a. In addition, the court continued, a telephone company is not engaged in state action when it complies with the restrictions mandated by the statute; because "[t]he telephone company does not act under governmental compulsion either when it undertakes or refuses to undertake dial-a-porn billing, * * * it cannot be a state actor when it implements a presubscription billing system." *Id.* at 20a-21a. In any event, the court concluded, "[a] requirement that one desiring access make an advance request therefor simply does not constitute a prior restraint." *Id.* at 21a.

ARGUMENT

1. As petitioners acknowledge (Pet. 16-17), the Second Circuit's decision in this case is consistent with the only other decision to address the constitutionality of 47 U.S.C. 223, *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866 (9th Cir. 1991). There is no conflict, moreover, between the decision in this case and *Fabulous Associates, Inc.* v. *Pennsylvania Public Utility Comm'n*, 896 F.2d 780 (3d Cir. 1990). See Pet. 16-17.

In *Fabulous Associates*, the Third Circuit struck down a Pennsylvania statute that prohibited dial-a-porn providers from making their messages available to persons who had not obtained a numerical access code, holding that that procedure was not the least restrictive alternative available to shield minors from indecent telephone communications. 896 F.2d at 788. The Third Circuit did not suggest that a presubscription requirement of the sort at issue in this case would be subject to the same objection, noting that it was "intimat[ing] no opinion on the constitutionality of" a presubscription requirement or voluntary blocking. *Id.* at 787 n.6. Indeed, the Third Circuit ultimately invalidated the access code requirement on the ground that a presubscription requirement or voluntary blocking would be less restrictive than mandatory access codes. *Id.* at 787-788.

As even the district court in this case recognized (Pet. App. 36a), *Fabulous Associates* "did not evaluate the comparative restrictiveness" of the statutory presubscription procedure in relation to voluntary blocking. There is, therefore, no inconsistency between the Third Circuit's reasoning and the Second Circuit's decision here.

2. The court of appeals' conclusion that 47 U.S.C. 223 is constitutional is well founded.

a. As this Court recently reaffirmed in *Sable*, 492 U.S. at 126, the government has a compelling interest in protecting the physical and psychological well-being of minors. That interest "extends to shielding minors from the influence of literature that is not obscene by adult standards," and laws calculated to advance it are constitutional as long as they are "carefully tailored" to that end. *Ibid.* When applying this familiar standard, a court must do more than consider whether there is an alternative means of regulation that imposes a lesser burden on protected speech. The court must also assess whether the alternative is as effective in furthering the compelling interest in question. In *Sable*, for instance, this Court's holding—that a categorical prohibition on dial-a-porn was not a narrowly tailored means of protecting children—was contingent upon the existence of other "extremely effective" alternatives (*id.* at 130-131 (footnote omitted)):

> For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. If this is the case, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.

The court of appeals faithfully applied the same analytical approach when it concluded that voluntary blocking, although it might be the "least economically restrictive * * * means of regulation," was not "an effective means" of accomplishing the congressional purpose of denying children access to dial-a-porn. Pet. App. 17a. Contrary to petitioners' contention (Pet. 12), the court's reasoning did not shift the burden of proof on the availability of less restrictive alternatives, nor did it improperly disregard the district court's factual findings. Applying the appropriate standard of appellate review, the court simply found that the district court's finding that voluntary blocking would be effective was clearly erroneous. Pet. App. 17a.

The court of appeals' determination was fully justified. As the court noted (Pet. App. 15a), the record establishes that, even after voluntary blocking had been available in the New York area for two years, only 4% of the area's residential telephone lines had been blocked. The remaining 96% were still available to minors seeking access to indecent messages. That state of affairs did not result from voluntary choices by parents; "half" of the residential households in New York "are not aware of either the availability of dial-a-porn or of blocking." *Id.* at 16a. This evidence—as well as common sense and the truism that "[i]t always is more effective to lock the barn *before* the horse is stolen," *ibid.*—underlay the court's conclusion that "[v]oluntary blocking simply does not do the job of shielding minors from dial-a-porn." *Id.* at 17a. There is no merit to petitioners' suggestion (Pet. 14-15) that the court of appeals was moved by its own predilections, rather than by an appropriate analysis of the relevant materials.

The court's conclusion that voluntary blocking is ineffective is also consistent with the conclusion of the FCC, the agency charged with promulgating regulations to supplement 47 U.S.C. 223. In its rulemaking proceeding, the FCC determined that "voluntary blocking by itself does not substantially eliminate calls to indecent message providers by children." *Report and Order*, 5 F.C.C. Rcd at 4928 ¶ 21. That is so, the Commission found, because voluntary blocking does not take account of the likelihood that "most parents would not realize the need for blocking until their children had already obtained access to indecent messages," and "neighbors or relatives where children are only occasional visitors" would not "recognize the need to, nor act to, have access blocked." *Id.* at 4928 ¶ 18. The Ninth Circuit upheld the Commission's conclusion that voluntary blocking would not be an effective means of shielding children from dial-a-porn. *Information Providers*, 928 F.2d at 873-874.

b. The court of appeals was also correct in concluding that the statutory prohibition on "indecent" telephone communications is not unconstitutionally vague. Due process requires that a statutory prohibition be "clearly defined," *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972), but "mathematical certainty" is unattainable, *id.* at 110, and "due process does not require 'impossible standards' of clarity." *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). It is sufficient, therefore, that a statute "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned*, 408 U.S. at 108.

As the court of appeals noted, the FCC has defined telephone indecency as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." Pet. App. 13a (quoting *Report and Order*, 5 F.C.C. Rcd at 4927 ¶ 12). This definition parallels the one that this Court upheld in *Pacifica* with respect to broadcasting. See 438 U.S. at 731-732. Thus, by the time Congress enacted the statute at issue, the term "indecent" had "a judicially recognized meaning that is not unconstitutionally vague." *Information Providers*, 928 F.2d at 874. *Pacifica* forecloses any contention that the concept of indecency is constitutionally deficient in the context of telephone communications. "If the indecency definition passes the void-for-vagueness test for persons of ordinary intelligence who broadcast radio communications, it certainly must pass the same test for those persons who offer indecent communications over the telephone line." *Information Providers*, 928 F.2d at 875.

Contrary to petitioners' contention (Pet. 19-20), nothing in *Sable* casts any doubt on this reasoning. *Sable* did recognize that there are distinctions between the telephone and broadcast media. Specifically, the Court noted that "broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read.' " 492 U.S. at 127. But those distinctions are material only to the type of regulation that may constitutionally be employed to restrict access to indecent material; they do not make it more difficult to determine what material is indecent.[2]

---

[2] In fact, the statute at issue in *Sable* was challenged on grounds of vagueness. See 88-515 & 88-525 Br. for Appellant/Cross Appellee Sable Communications of Calif., Inc., at 32-37. As the Ninth Circuit recognized, by failing to address that challenge while at the same time endorsing narrowly tailored efforts to regulate dial-a-porn, this Court in *Sable* strongly suggested that "the term 'indecent' as interpreted by the Commission is not per se void for vagueness." *Information Providers*, 928 F.2d at 874. Like this case, *Sable* involved

c. The statute does not absolutely prohibit the distribution of any particular indecent message. Rather, it provides that *if* the telephone company collects fees for those providing indecent messages and if it is technologically feasible, the telephone company may not provide the messages to persons who have not requested access in advance. This procedure entails no prior restraint on speech.

In the first place, the presubscription requirement is not the kind of "restraint" at which the prior restraint doctrine is directed. That requirement is applicable only when telephone companies make billing services available to providers of indecent telephone messages and those providers choose to take advantage of them; even then, the presubscription requirement is satisfied by a written request from a person wishing to receive indecent messages. In terms of its tendency to inhibit speech, the presubscription requirement

> is conceptually no different from requesting access to a periodical by subscription, requesting admittance at a box office to an adult movie or requesting a copy of an adult magazine kept under the counter in a plain brown wrapper at the convenience store.

Information Providers, 928 F.2d at 878. Presubscription is not the equivalent of a prior injunction against speech or other similar legal prohibitions triggering the constitutional prohibition on prior restraints.

In any event, any restraint on speech that flows from the statute is not due to governmental action. The presubscription requirement comes into play only

---

a statute providing for criminal sanctions. See 492 U.S. at 120.

if the carrier collects "an identifiable charge" that it then remits, "in whole or in part," to the dial-a-porn providers. 47 U.S.C. 223(c)(1). See *Information Providers*, 928 F.2d at 872, 877. That requirement is the result of the telephone company's choice to provide billing and collection services, and the dial-a-porn provider's decision to employ them, rather than governmental action. See *Information Providers*, 928 F.2d at 877.[3]

Finally, the statute does not require carriers to "classify which services are indecent." Pet. 23. On the contrary, the dial-a-porn provider must notify the carrier that his service is encompassed by the statute in order to invoke the presubscription safe harbor. The placement of that burden is implicit in 47 U.S.C. 223(c)(2)(B), which contemplates that a provider will make a "representation" regarding the applicability of the statute to his messages. As the appeals court noted in this case (Pet. App. 20a), this is also the FCC's interpretation of the statute. See *Report and Order*, 5 F.C.C. Rcd at 4931 ¶ 36. Plainly, the decision by private dial-a-porn providers to avail themselves of the presubscription safe harbor by identifying their messages as covered by the statute is not state action.

---

[3] Petitioners contend (Pet. 22) that state action is present, at least in New York, because but for the statute, state public service commission rules would prohibit telephone companies from imposing a presubscription requirement. The fact that state law may require telephone companies to provide specified services unless federal statutes require otherwise does not convert those companies into federal actors when they comply with federal law. In any event, the interplay between New York's law and 47 U.S.C. 223(c) is not an issue of general importance calling for this Court's attention.

CONCLUSION

The petition for for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

DECEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE; 1991 312324 45222

③

No. 91-697

Supreme Court, U.S.
FILED
DEC 30 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

◆

DIAL INFORMATION SERVICES CORP. OF NEW YORK; FABULOUS ASSOCIATES, INC.; SOURCE COMMUNICATIONS, INC.; and TELE-PRO COMMUNICATIONS CORP.,

Petitioners,

—v.—

RICHARD THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PETITIONERS

EVAN WOLFSON
Counsel of Record
MYLES B. SILTON
Cooperating Attorney
Lambda Legal Defense
& Education Fund, Inc.
666 Broadway
New York, New York 10012
(212) 995-8585

December 30, 1991

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

CONSENT OF THE PARTIES vii

INTEREST OF AMICUS CURIAE vii

SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING PETITION FOR CERTIORARI 3

I. THE HELMS AMENDMENT SEEKS TO CURB EXPRESSION PROTECTED BY THE FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSOCIATION AND THE RIGHT TO PRIVACY. 3

   A. The Telephone Plays a Unique Role in Society that Implicates a Range of First Amendment Interests. 4

   B. Settled First Amendment Doctrine Establishes That Telephonic Communication is Constitutionally Protected. . .6

   C. The Services Provided by Petitioners Fulfill Important and Socially Useful Functions For Many Gay, Disabled,Or Otherwise Isolated Individuals. . . . 12

TABLE OF CONTENTS

(continued)

D. The Services Provided by Petitioners Facilitate Speech that Serves a Significant Public Health Interest in the Context of the Current AIDS Crisis. 19

II. BECAUSE BLOCKING TECHNOLOGY NOW EXISTS THAT WOULD ACHIEVE THE GOVERNMENT'S PURPORTED AND SOLE LEGITIMATE PURPOSE OF PROTECTING MINORS, THIS STATUTE IMPERMISSIBLY AND UNNECESSARILY BURDENS THE FIRST AMENDMENT AND PRIVACY RIGHTS OF USERS OF PETITIONERS' SERVICES. 26

CONCLUSION 36

TABLE OF AUTHORITIES

Cases Page

Action for Children's Television v. FCC, 852 F.2d 1332, 1340 (D.C. Cir. 1988) 12

American Information Enterprises, Inc. v. Thornburgh, 742 F. Supp. 1255, 1263 (S.D.N.Y. 1990) 16, 18, 26, 35

Bates v. Little Rock, 361 U.S. 516 (1960) 28

Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983) 33

Bowers v. Hardwick, 478 U.S. 186, 195 (1986) 6

Butler v. Michigan, 352 U.S. 380, 383 (1957) 33

Carlin Communications, Inc. v. FCC, 749 F.2d 113, 114 (2d Cir. 1984) 18

City of Dallas v. Stanglin, 57 U.S.L.W. 4406 (Apr. 3, 1989) 10, 11

Fabulous Associates, Inc. v. Penn. Public Utility Comm'n, 693 F. Supp. 332, 337 (E.D. Pa. 1988) 5

FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 604 (1990) 36

Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988) 15

Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984, cert. denied, 471 U.S. 1001 (1985) 15

TABLE OF AUTHORITIES

(continued)

Cases Page

Gay Students Organization v. Bonner, 509 F.2d 652 (1974) 14

Katz v. United States, 389 U.S. 347, 360 (1967) 6

Lakewood V. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988). 36

Lamont v. Postmaster General, 381 U.S. 301, 307 (1965) 29

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 36

Marks v. United States, 430 U.S. 188, 198 (1977) 18

Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437) 32

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958) 27

Police Dept v. Mosley, 408 U.S. 92, 95-96 (1972) 27

Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) 10, 13

Sable Communications of California v. F.C.C., 109 S. Ct. 2829, 2837 (1989) . 1

Shelton v. Tucker, 364 U.S. 479 (1960) 15

TABLE OF AUTHORITIES

(continued)

Cases Page

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) 36

Speiser v. Randall, 357 U.S. 513, 525 (1958) 34

Stanley v. Georgia, 394 U.S. 557 (1969) 6

Talley v. California, 362 U.S. 60 (1960) 28

Statutory Law Page

The Communications Act of 1934, 47 U.S.C. §§ 223 2

Miscellaneous Page

Attorney General's Commission on Pornography, Final Report 1269 (July 1986) 19

Congressional Record, S. 14203, October 14, 1987. 20

D'Eramo, Quandland, Shattls, Schuman, and Jacobs, "The 800 Men Project: A Systematic Evaluation of AIDS Prevention Programs Demonstrating the Efficiency of Erotic, Sexually Explicit Safer Sex Education on Gay and Bisexual Men at Risk for AIDS," CDC AIDS Weekly, (Oct. 24, 1988) 22-23

Gay Men's Health Crisis, "Eroticizing Safer Sex." 25

TABLE OF AUTHORITIES

(continued)

Miscellaneous Page

Karst, "The Freedom of Intimate Association," 89 Yale L.J. 624 (1980) . 9

National Research Council, National Academy of Sciences, "AIDS: Sexual Behavior and Intravenous Drug Use," (1989) 19, 21

U.S. GAO, AIDS Education: Reaching the Population at Higher Risk, Sept. 1988, (reprinted in AIDS Reference Guide, Section 1408, p.9) (March 1988) . . . 22

Univ. of California, San Francisco's AIDS Health Project, "Suggested Guidelines for Sensible Sex" (Aug. 1986) 25

CONSENT OF THE PARTIES

The parties have consented to the filing of this brief. Their letters of consent are filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Lambda Legal Defense and Education Fund, Inc. ("LAMBDA"), appearing as amicus curiae, is a New York non-profit corporation, and is the country's oldest and largest national gay and lesbian legal rights advocacy organization. LAMBDA was organized in 1973 "to seek, through the legal process, to insure equal protection of the laws and the protection of civil rights of homosexuals" and in furtherance of that purpose, "to initiate or join in judicial and administrative proceedings whenever legal rights and interests of significant numbers of homosexuals may be affected."

LAMBDA Certificate of Incorporation, ¶ 2.2(a).

LAMBDA has appeared as counsel of record or as amicus curiae in numerous cases involving the legal rights of gay men and lesbians in state and federal courts throughout the country, including challenges to statutes that restrict the constitutional rights of lesbians and gay men, and in cases that have challenged laws, regulations, or private actions that discriminate against or restrict the basic civil rights of gay men and lesbians.

In accordance with its purposes, LAMBDA has a strong interest in this case. LAMBDA is particularly concerned about the far-ranging impact of the challenged statute on the First Amendment rights of gay men and women who utilize "adult-oriented" phone information services. We are also deeply concerned about the challenged statute's impact on efforts to facilitate safer sexual practices to avoid the transmission of the human immunodeficiency virus (HIV), the virus associated with acquired immunodeficiency syndrome (AIDS). LAMBDA appeared as amicus curiae before the District Court in this case.

SUMMARY OF ARGUMENT[1]

In Sable Communications of California v. F.C.C., this Court reaffirmed that "[s]exual expression which is indecent but not obscene is protected by the First Amendment[.]" 109 S. Ct. 2829, 2837 (1989). Such expression is constitutionally protected as a valuable form of speech and association among free people. The phone services under attack here facilitate people's choice to engage in such protected speech and association in the privacy of their own homes and over their own telephones. Such speech is not the mere "indecent" sexual banter that the government seeks to portray, but to the contrary serves important functions

---

1/ To avoid duplication, Lambda adopts the Statement of the Case in the Petition, and the First Amendment arguments set forth by Petitioners on standards for content-based regulation, vagueness, and prior restraint.

for many gay, disabled, and otherwise isolated individuals relating to the exchange of information, the pursuit of companionship, entertainment, and risk-free sexual satisfaction in the midst of the AIDS crisis.

In striking down a statute virtually identical to the one at issue here, the Court noted:

> Because the statute's denial of adult access to telephone messages which are indecent but not obscene _far exceeds that which is necessary to limit the access of minors to such messages_, we hold that the ban does not survive constitutional scrutiny.

_Id_. at 2839 (emphasis added). The instant statute -- the 1989 Amendment to the Communications Act of 1934, 47 U.S.C. §§ 223(b) and (c) (the "Helms Amendment") -- is merely the latest incarnation of the same unconstitutional governmental impulse to stifle so-called "indecent" speech. Because it, too, "far exceeds that which is necessary" to achieve any legitimate and compelling state interest, this Court should strike it down.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Point I

THE HELMS AMENDMENT SEEKS TO CURB EXPRESSION PROTECTED BY THE FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSOCIATION AND THE RIGHT TO PRIVACY.

The telephone reaches into almost every American home and carries speech as freely as the air; consequently, the government's attempt here to control what Americans say to each other over the telephone threatens a massive and pervasive intrusion into privacy and First Amendment rights. As phone lines enter into nearly all American homes and offices, linking people throughout the nation, this statute, if allowed to stand, will send a chill into every

American household. Rather than people "reach[ing] out and touch[ing] someone," it is the government that will reach out and muzzle protected speech over phone wires.

A. The Telephone Plays a Unique Role in Society that Implicates a Range of First Amendment Interests.

A unique medium of communication and association, combining elements of expression and privacy in a form that nearly all Americans now take for granted, the telephone enables us to communicate with each other -- casually or intimately -- while never leaving the privacy of our homes. Personal and warm conversations, commercial speech, entertainment, even cries for help are all engaged in, privately, over the telephone. We inform, amuse, educate, and explain ourselves over the telephone, retaining control over whom we speak or listen to, and when. Among the most valuable of the characteristics of telephone communication is the ability to converse intimately while retaining, if so desired, one's anonymity. Present technology, as offered by electronic publishers, information providers, and other speech-facilitating services, now permits anonymous discourse and association between like-minded people on topics of interest to them, without the need to leave the home or set foot in the street. Although a new technology, this means of communicating and associating retains core features protected by the First Amendment. Equally important, through the telephone, we need not expose ourselves to unwanted expression or association, for we can decline to pick up the phone, hang up, or, thanks to present technology now in place, block access from our home phones to unwanted communication. Correspondingly, unconsenting others need never be exposed to our speech over the telephone.

B. Settled First Amendment Doctrine Establishes That Telephonic Communication is Constitutionally Protected.

This Court has long recognized that Americans have a "reasonable expectation of privacy" in their use of the telephone to speak and associate. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). It is similarly well-settled that Americans have a privacy and First Amendment interest in having and using sexual material, even if obscene, in the privacy of their own homes. Stanley v. Georgia, 394 U.S. 557 (1969).[2/] Surely then, Americans have

---

[2/] Although a privacy case, the Court has acknowledged that Stanley "was firmly grounded in the First Amendment." Bowers v. Hardwick, 478 U.S. 186, 195 (1986).

reasonably come to expect that matters sexual discussed over the telephone in private, like protected speech in general in the home or on the phone, will not be intruded upon or interfered with by the government.

In Stanley, the Court declared that, "[i]f the first amendment means anything, it means that the state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." The Court held it "wholly inconsistent with the philosophy of the first amendment" for the state to "exercise the power to control men's minds" or to seek "the right to control the moral content of a person's thoughts." Id. at 565-66. Certainly if the state may not control the moral content of a person's thoughts, it must be extremely circumspect in its efforts to restrict the expression of such thoughts to others. In America, it is the individual, not the government, who decides to whom to speak or to listen. Stanley considered an intersection of rights to privacy and expression closely akin to those at issue here. As one federal court put it, rejecting an attempt at government censorship not dissimilar to the one proposed here:

> If the First Amendment "means that a state has no business telling a man, sitting alone in his own house what books he may read or what films he may watch," Stanley, then it certainly means that the state cannot censor or unreasonably burden the protected speech accessed or engaged in by adults vis-a-vis the telephone.

Fabulous Associates, Inc. v. Penn. Public Utility Comm'n, 693 F. Supp. 332, 337 (E.D. Pa. 1988) (citation omitted). As the American government refrains from censoring its citizens' private libraries or peering into their bedrooms, neither should it seek to stifle their ability to converse privately about intimate matters. The legislation at issue before the Court, however, attempts to do just that.

The intersection of privacy and expression rights under the First Amendment also creates a "right of association" which is implicated in the present case. See, e.g., Karst, "The Freedom of Intimate Association," 89 Yale L.J. 624 (1980).[3/] "[T]he Bill of Rights . . . must afford the formation and preservation of certain kinds of highly personal relationships a

---

[3/] Professor Karst sets forth a number of values such intimate associations serve, including the opportunity to enjoy and benefit from social intercourse and companionship, and the opportunity for caring, commitment, and love. 89 Yale L.J. at 630-36. These are clearly the entitlement of free men and women. They are precisely what the services here facilitate, for some people almost indispensably.

substantial measure of sanctuary from unjustified interference by the State." Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984). Such "highly personal" or "intimate" associations have been carefully protected by the Supreme Court. See, e.g., City of Dallas v. Stanglin, 57 U.S.L.W. 4406 (Apr. 3, 1989) (distinguishing unprotected associations in public social halls from other more intimate ones).

In Stanglin, Chief Justice Rehnquist wrote for the Court:

> While the First Amendment does not in terms protect a "right of association," our cases have recognized that it does embrace such a right in certain circumstances. In Roberts, we noted two different sorts of "freedom of association" that are protected by the United States Constitution:
>
> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has

> concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Stanglin, 57 U.S.L.W. at 4407 (emphasis added) (citation omitted). Although the Court in Stanglin held that "dance-hall patrons, who may number one thousand on any given night, are not engaged in the sort of 'intimate human relationships' referred to in Roberts," id. at 4407, it carefully preserved that protected sphere of association that more aptly characterizes the more intimate exchanges and encounters we engage in over the telephone.[4] Thus, the Helms Amendment implicates not just speech and privacy rights, but freedom of association as well.

C. The Services Provided by Petitioners Fulfill Important and Socially Useful Functions For Many Gay, Disabled, Or Otherwise Isolated Individuals.

The First Amendment protects adults in their right to engage in so-called "indecent" speech over the telephone regardless of any deeper social significance to that speech. See Action for Children's Television v. FCC, 852

---

[4] In his concurrence, Justice Stevens, joined by Justice Blackmun, observed that "the opportunity to make friends and enjoy the company of other people -- in a dance hall or elsewhere -- is an aspect of liberty protected by the Fourteenth Amendment." Stanglin, 57 U.S.L.W. at 4409. He concurred in the judgment because the city had "adequately justified the ordinance's modest impairment of the liberty of teenagers. Indeed . . . the ordinance actually gives teenagers greater opportunity to associate than they would have if the . . . provision were invalidated." Id. (emphasis added).

F.2d 1332, 1340 (D.C. Cir. 1988) ("Indecent but not obscene material . . . qualifies for First Amendment protection whether or not it has serious merit"). Even if the speech restrained by the Helms Amendment were, as characterized by the government, merely "indecent" it would qualify for First Amendment protection. In fact, however, such speech serves important purposes for those who participate in it, and thus warrants full and vigorous First Amendment protection.

For many Americans, the telephone is an irreplaceable and essential means of associating with, and expressing themselves to others in "highly personal relationships." Roberts, 468 U.S. at 618. This is particularly true for people in isolated communities, whether such isolation is geographical, cultural, or the result of physical infirmity or disability.

For example, for many gay men and lesbians, the telephone may be the only viable means of reaching out to, talking with, socializing with, and even meeting other gay people. Feeling alone or cut off, fearing discrimination or violence in an often hostile world, or perhaps simply desiring to preserve their privacy and discretion (a choice valued by and precious to all citizens), such citizens have a particular need to use the telephone as a lifeline to others, a vital avenue for the exercise of their rights to associate with, seek the company of, and speak with other like-minded adults.[5/] For many gay people

---

[5/] Gay people have frequently confronted government attempts to impair their ability to associate. See, e.g., Gay Students Organization v. Bonner, 509 F.2d (continued...)

(as well as many others) the services provided by Petitioners offer an opportunity to engage in intimate adult communication while retaining a deeply desired and guarded anonymity. To require individuals to submit a request in writing to the telephone company -- revealing themselves to a mammoth and impersonal corporate institution -- prior to the delivery of such services would effectively deter people from engaging in admittedly protected speech.[6]

5/(...continued)
652 (1974) (rejecting ban on lesbian and gay social events on campus because of both the political and expressive value of such social groups). The government has sought to prevent gay people's association, even when it involved only speech. Id.; see also Gay & Lesbian Students Assn v. Gohn, 850 F.2d 361 (8th Cir. 1988); Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984, cert. denied, 471 U.S. 1001 (1985).

6/ In its reasoned and thorough analysis of the record before it in this case, the District Court pointed out that in the

(continued...)

For the disabled and the ill, including people with AIDS or HIV infection, the telephone is a godsend, providing safe and easy access to information vital to their health and public health goals of disease prevention, to psychologically supportive companionship and entertainment, and to risk-free sexual satisfaction. Indeed, private, erotic communication over the telephone has also become an integral prophylactic measure for many of the "worried well" in both the gay and heterosexual populations who seek to abstain from direct sexual contact with

---

6/ (...continued)
government's survey of households which had used sexually explicit telephone services in the preceding month, more than 70 percent responded that they were not "very likely" to pre-subscribe and more than 60 percent responded that they were "not very likely or somewhat likely" to pre-subscribe. American Information Enterprises, Inc. v. Thornburgh, 742 F. Supp. 1255, 1263 (S.D.N.Y. 1990).

others. Even were this Court to conclude there is no right of association that protects ordinary social intercourse and acquaintanceship, a vision of the Constitution from which the Founders and most Americans would undoubtedly recoil, it would have to find that the possibility of intimate association that the telephone provides to the ill, the disabled, and the isolated is so socially redeeming and so personally significant as to warrant full constitutional protection.

Phone services of the kind made available by the information providers and electronic publishers in this case facilitate these important kinds of communication, expression, and association. As the record reflects, millions of callers find the services and the human contacts they make available to be valuable sources of information, companionship, and entertainment, both sexual and otherwise.[7] See Carlin Communications, Inc. v. FCC, 749 F.2d 113, 114 (2d Cir. 1984) (180,000,000 calls in one year). "[H]owever distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise they would have no value in the marketplace." Marks v. United States, 430 U.S. 188, 198 (1977)

---

[7] "Gov. Ex. L. New York Telephone has projected that implementation of pre-subscription would result in a reduction of over 7,000,000 calls annually" in New York alone. American Information Enterprises at 1264 (emphasis added). The reduction of calls nationwide would, of course, be far greater still under the Helms Amendment.

(Stevens, J., concurring in part and dissenting in part).[8]

D. The Services Provided by Petitioners Facilitate Speech that Serves a Significant Public Health Interest in the Context of the Current AIDS Crisis.

The National Academy of Sciences has declared: "Education is critical to controlling the spread of HIV/AIDS." National Research Council, National Academy of Sciences, "AIDS: Sexual

---

[8] As Dean Geoffrey Stone of the University of Chicago Law School put it:

> [T]he very fact . . . that there is a vast market in our society for sexually explicit expression suggests that for many people, this type of speech serves what they believe to be, it may be amusement, it may be containment, it may be sexual stimulation, it may be fantasy, whatever it is, many of us believe that this expression is to our own lives, in some way, valuable. That value should not be overlooked.

Attorney General's Commission on Pornography, Final Report 1269 (July 1986).

Behavior and Intravenous Drug Use," at 26 (1989) ("NAS Report"). The services offered by Petitioners provide safer-sex education and information as to means of preventing HIV, or, in other formats, facilitate the exchange of such information.

In AIDS awareness and prevention efforts, it is vital that sex and sexuality be discussed "in clear, explicit language in the idiom of the target audience." Id. at 19. Although some may consider such discussions "indecent,"[9] experts and health professionals agree that only such information, coupled with the means of modifying behavior, can stem the transmission of HIV.[10/]

---

[9] On that score, it is no coincidence that Senator Jesse Helms, the sponsor of this restrictive legislation and its prior incarnation, struck down by the Court in Sable, has also characterized expert written "safe sex" education materials as "obscene." 133 Cong. Rec. S14203 (daily ed. Oct. 14, 1987). This Court might better heed the cautionary words of medical experts on the scientific importance of encouraging the flow of explicit discourse on AIDS and sexuality, (continued...)

9/ (...continued)
unimpeded by those who may be offended:

> AIDS education efforts provide a number of examples in which potentially effective prevention activities have become entangled in social conflicts that caused . . . a weakening of their message. Specific controversies have involved restriction on the use of explicit language in educational materials [and the perceived] conflict between providing scientific information and promoting particular moral values in AIDS prevention messages.

NAS Report, p. 26 (emphasis added).

10/ As the U.S. Government Accounting Office noted in a recent report on AIDS education:

> [One] step in health education is the provision of persuasive motivators for risk reduction. . . . Some research suggests an effective alternative -- positive motivators. Some motivators are symbolic, such as social approval for risk reduction

(continued...)

Sexually explicit materials and discussions can play a critical and affirmative role in reinforcing the public health imperative to avoid unsafe sexual interaction with other people. At the Fourth International Conference on AIDS in Stockholm, public health experts described research demonstrating that sexually explicit materials presenting safer sex behavior in an affirmatively erotic manner were the single most successful motivator to abandon high-risk behavior in favor of low- or no-risk behavior. See J. D'Eramo, M. Quandland,

---

10/ (...continued)

> and "eroticized" safer sex. . . . "Eroticizing is an effort to make safer sex more attractive so that people can more easily substitute safer sex . . . for the riskier sex . . . to which they may be more accustomed.

U.S. GAO, AIDS Education: Reaching the Population at Higher Risk, Sept. 1988, reprinted in AIDS Reference Guide, Section 1408, p. 9 (March 1988).

W. Shattls, R. Schuman, and R. Jacobs, "The 800 Men Project: A Systematic Evaluation of AIDS Prevention Programs Demonstrating the Efficiency of Erotic, Sexually Explicit Safer Sex Education on Gay and Bisexual Men at Risk for AIDS," summarized in CDC AIDS Weekly, p. 13 (Oct. 24, 1988).

Such means of behavior modification and avenues for safer sexually explicit exchanges are literally just what the doctor ordered. They are also just what many of the services threatened by the Helms Amendment provide. Many Americans, mindful of the potentially calamitous results of engaging in unprotected, intimate physical contact with others, have decided to abandon such activities. Seeking to protect both themselves and others, they have opted instead for the satisfaction afforded by engaging in completely safe, private erotic conversation with like-minded others.

There is abundant direct and anecdotal evidence that many people use the variety of "adult" information programs and interactive conversational services as a form of "safe sex," instead of engaging in sexual release involving physical contact or the exchange of such body fluids as semen. For example, records of the San Francisco AIDS Foundation's safer sex workshops, counseling thousands of gay men in HIV prevention, reveal that participants spontaneously named "phone sex" as a safe sex outlet in every recorded session. Memo to San Francisco AIDS Foundation Staff from C. Frutchey, Assistant Director of Education (Mar. 10, 1989). Several leading AIDS prevention organizations issue safer sex guidelines recommending phone sex as a form of safe sex.[11]

Finally, coming full circle, these services provide sorely needed counseling and companionship to those who are HIV-infected, or who live with or care for someone else who is. As a particular manifestation of a more universal need for companionship, expression, and association, these needs are fully deserving of vigilant protection by this Court.

---

[11] See, e.g., Gay Men's Health Crisis, "Eroticizing Safer Sex," p. 26 ("using telephone sex services" listed as a "safer sex act"); see also Univ. of California, San Francisco's AIDS Health Project, "Suggested Guidelines for Sensible Sex" (Aug. 1986) (listing "phone sex" and "pornography" as "no risk sex"). Gay Men's Health Crisis (GMHC), based in New York City, is the nation's oldest and largest AIDS service organization, counseling thousands of people on the prevention of, and living with, AIDS.

Point II

BECAUSE BLOCKING TECHNOLOGY NOW EXISTS THAT WOULD ACHIEVE THE GOVERNMENT'S PURPORTED AND SOLE LEGITIMATE PURPOSE OF PROTECTING MINORS, THIS STATUTE IMPERMISSIBLY AND UNNECESSARILY BURDENS THE FIRST AMENDMENT AND PRIVACY RIGHTS OF USERS OF PETITIONERS' SERVICES.

The district court correctly held that "as a regulation aimed at the content of indecent telephone speech, the Helms Amendment's procedural mechanisms and substantive terminology must be scrutinized." American Information Enterprises v. Thornburgh, 742 F. Supp. 1255, 1261 (S.D.N.Y. 1990) (emphasis added). Such scrutiny reveals that the statute, by chilling and even banning speech and association over the phone, impermissibly burdens the protected privacy expectations and First Amendment interests described in Point I.[12/]

Long ago, this Court recognized that forcing people to identify themselves as a prerequisite to the exercise of First Amendment rights may be an unconstitutional deterrent to such exercise. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958) ("compelled disclosure . . . may

---

[12/] In addition to the arguments advanced below, Lambda adopts the other First Amendment arguments submitted to the Court by Petitioners. In particular, the Helms Amendment is vague and overbroad in its attempt to regulate so-called "indecent" speech among adults. It is an impermissible content-based restriction, which the government may not impose. Police Dept v. Mosley, 408 U.S. 92, 95-96 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). Presubscription works an intolerable prior restraint on speech. As discussed below, the Helms Amendment is neither the least restrictive means of achieving, nor is it narrowly tailored to achieve, a legitimate government objective.

constitute a restraint on freedom of association").[13] In evaluating whether such deterrence is constitutionally acceptable, the Court must consider whether the restriction at issue is necessary and narrowly tailored to serve a compelling governmental interest. As recently as the Sable case, the Court reaffirmed its longstanding recognition that, over the telephone, as in any medium:

> [t]he government may [only] regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. . . . It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends.

---

[13] See also, e.g., Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960).

109 S. Ct. at 2836 (emphasis added). Unfortunately, this legislation is neither "carefully tailored" nor the "least restrictive means" to accomplish its purported end of protecting children from exposure to "indecent" speech.

While some of the technology in this case may be new, this is not the first time courts have had to repel this kind of government effort to chill unpopular speech by requiring those wishing to exercise First Amendment rights to take steps to identify themselves. In Lamont v. Postmaster General, the Court rejected the equivalent of the presubscription scheme attempted here in the context of speech through the mails. 381 U.S. 301, 307 (1965). The Court held:

> We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of

> the addressee's rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect[.]

Id. at 307 (emphasis added).

The "presubscription" regime at issue in Lamont was closely akin to the needless requirement of a formal written request to the phone company that burdens free speech and association in this case. The Lamont Court rejected a rule whereby the post office would detain material characterized as "communist political propaganda," and would send to the addressee a card to be checked indicating a desire to receive such mail. Thus, before having equal access to the free flow of information over a purportedly neutral medium, an individual would first have to identify him or herself and take affirmative steps that could be stigmatizing. Those who declined affirmatively to so identify themselves were denied access to the speech.

The Court struck down this restriction on communication, rejecting the notion that the government may "require[] an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights." Id. at 305. Underlying the Court's repudiation of such an affirmative burden on the access to speech and association was its recognition that:

> [T]he postal system . . . is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.

Id. at 305 n.3 (emphasis added). The Court observed:

> The United States may give up the Post Office when it sees fit, but

> while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues[.]

Id. at 305 (quoting Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 437) (Holmes, J., dissenting) (emphasis added).

Today, it is the telephone that is "the main artery through which business, social, and personal affairs are conducted." Lamont, 381 U.S. at 305 n.5. Such communications are no less entitled to protection now than they were before.[14] Indeed, because of the heightened privacy and personal control that telephone technology has brought, speech and association over the telephone are even more deserving of vigilance against intrusive government control than the mails or other avenues of communication.[15] Speech over the telephone between consenting parties is more intimate, more personal, and infinitely more unlikely to fall on unwilling ears than speech over the air. Like the virtually unfettered free speech right to "use our tongues," id. at 305, our right to use our telephones must be secure and free of needless burden or restraint.

---

[14] It is significant that the Court did not decide Lamont on the ground that it affected "political speech." Id. at 307; consequently, the Court's direct repudiation of the presubscription process bears with full force on the statutory scheme challenged here.

---

[15] In a long line of cases, the Supreme Court has made it clear that government may not, in the name of protecting minors against so-called "indecency," reduce "[t]he level of discourse reaching a mailbox to that which would be suitable for a sandbox," Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983), or "in order to shield juvenile innocence . . . burn the house to roast the pig." Butler v. Michigan, 352 U.S. 380, 383 (1957).

While the Court has permitted some restrictions of "indecency" in the context of radio and network television, it has repeatedly made clear that "the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." Bolger, 463 U.S. at 74. With the telephone, an ever more personal and directed technology, it is even more important that adults be able to engage in free, "adult" speech, association, and conversation. In light of the availability of blocking technology such important protected speech need not be sacrificed one whit.

Nevertheless, as in Lamont, the government again seeks to impose an affirmative burden on those wishing to partake in constitutionally protected free speech and association. Not only is the government's attempt not a "sensitive tool" for achieving a legitimate purpose, Speiser v. Randall, 357 U.S. 513, 525 (1958), in light of more "narrowly tailored" blocking options available,[16/]

[16/] The District Court pointed out that

> the government presents no evidence to contradict the proposition that a properly implemented version of New
> (continued...)

it is an outright attempt to deprive adults of their right to speak freely and associate with other like-minded adults in their own homes, through the medium we all take for granted, the telephone.[17]

16/ (...continued)

> York's current voluntary blocking system is adequately protective of children and is less restrictive than either a pre-subscription requirement or an independent billing mechanism

and that

> [i]n comparison with pre-subscription and independent billing, voluntary blocking enables a greater number of households to have access to [information providers'] services and places fewer burdens on [information providers] and listeners.

American Information Enterprise v. Thornburgh, 742 F. Supp. at 1264, 1265 (S.D.N.Y. 1990).

17/ Not only does the presubscription requirement chill would-be speakers and listeners in the exercise of their First Amendment rights to speak and associate, it also constitutes an unconstitutional prior restraint on such protected speech. "While [p]rior restraints are not unconstitutional *per se* . . . [a]ny system of prior restraint . . . comes to this (continued...)

CONCLUSION

The Helms Amendment and the presubscription requirement it contains violate the right of individuals to speak, associate, and converse freely

---

17/(...continued)
Court bearing a heavy presumption against its constitutional validity." FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 604 (1990) (emphasis added), citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975). As the Court held in FW/PBS, Inc., "a scheme that places 'unbridled' discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." 110 S. Ct. at 605, Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988).

Here, where people are obstructed in their ability to engage in protected speech, where expression is chilled because phone company officials, under government command, are regulating undefined, so-called "indecent" speech and collecting a list of names susceptible to later abuse as well, there is a prior restraint on protected speech that must fall. The scheme at issue here is no less a prior restraint in practice just because the government has unconstitutionally delegated the restraint power to a heavily regulated, non-government actor. See Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

over their telephones in their own homes. Because the regime the government seeks to impose is a needless intrusion given existing voluntary blocking technology, we respectfully submit that this Court should grant the instant petition and strike down the statute as violative of the First Amendment and privacy rights.

Dated: December 30, 1991
New York, New York

Respectfully submitted,

EVAN WOLFSON
Counsel of Record
MYLES B. SILTON
Cooperating Attorney
Lambda Legal Defense
& Education Fund, Inc.
666 Broadway
New York, NY 10012
(212) 995-8585